85-1528

Supreme Court, U.S.
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IN SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985 NUMBER

DAVID E. HUBBLE,

Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

FISHER, RICE, BARLETT
ELION & WAYNE, P.C.

By: _____
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Petitioner, David E. Hubble, respectfully prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of Pennsylvania entered in this proceeding on January 16, 1986.

QUESTIONS PRESENTED

Whether Petitioner's Fifth and Fourteenth Amendment Right to be free from compulsory self-incrimination was violated; where Petitioner was the subject of custodial interrogation by the Pennsylvania State Police regarding a homicide investigation, where Petitioner asserted his right to speak to counsel before he made any incriminating statements, where the state police trooper advised the Petitioner that he did not think a public defender would be willing to speak to the Petitioner, and where

the trooper continued the interrogation until the Petitioner made inculpatory statements.

Whether the use at trial of Petitioner's first statement was rendered harmless error by the introduction of further inculpatory statements made by Petitioner; where it is clear that Petitioner's further statements were fruits of the first.

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OPINIONS BELOW

The Opinion of the Supreme Court of Pennsylvania is not reported. The Opinion of the Superior Court of Pennsylvania is reported at 318 Pa. Super. 76, 464 A.2d 1236 (1983). The Opinion of the Honorable Judge Walter for the Court of Common Pleas of Lebanon County en banc, is reported at 19 Leb. L.J. 101 (1980).

JURISDICTION

The Judgment of the Supreme Court of Pennsylvania reversing the Order of the Superior Court of Pennsylvania was entered on January 16, 1986.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part that "no person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ".

The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides in pertinent part that "no state shall make or enforce any law which shall

abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . .".

STATEMENT OF THE CASE

The present Petition is from the Order of the Supreme Court of Pennsylvania of January 16, 1986, reversing the Order of the Superior Court of Pennsylvania of July 15, 1983, in which the Superior Court granted the Petitioner a new trial. A complete and accurate summary of the facts pertinent to the issue at bar is contained in the Opinion of the Superior Court of Pennsylvania, attached hereto as Appendix "B". In compliance with Rule 21.1(G), a brief summary of those facts is set forth herein.

On August 5, 1976, Claire Kepner and her two children were robbed and murdered in her Muncy, Lycoming County home. An extensive investigation by the Pennsylvania State Police, which

included the use of hypnosis and sodium amytal analysis of potential witnesses, lead the State Police to suspect Petitioner of involvment in the crime. On April 7, 1977, Petitioner was questioned and subjected to a poloygraph examination by the State Police. Petitioner was again questioned by the State Police on several dates in early July, 1977. On July 12, 1977, Troopers John S. Shimko and Chester J. Zaremba, picked up Petitioner and his wife at their home at 9:30 a.m. for further questioning. Petitioner was subjected to a second polygraph examination. After the polygraph, Trooper Shimko informed Petitioner's wife, who was in a separate room, that Petitioner was probably involved in the killings. Shimko requested Petitioner's wife to assist Shimko in getting information from

Petitioner.

Shimko returned to the room in which Petitioner was located, accompanied by Petitioner's wife. Shimko continued questioning Petitioner until approximately 2:00 p.m., at which point Shimko became angry, stated that he knew Petitioner was involved in the crime and was lying, and stormed out of the room. Shimko returned approximately fifteen minutes later, apologized, and resumed questioning. Shimko requested that Petitioner give a taped statement regarding inculpatory statements made by Petitioner's brother, Robert Hubble. Petitioner's wife spoke before Petitioner answered, suggesting to Petitioner that he obtain a lawyer before giving any more statements. Petitioner then requested a lawyer. Shimko advised Petitioner that Shimko

did not believe that a public defender would talk to Petitioner, because Petitioner was not yet charged with a crime. After an unsuccessful attempt to contact a public defender, a brief telephone conversation with his probation office, and a brief conversation with his wife, Petitioner agreed to make a taped statement regarding inculpatory statements made by his brother, Robert Hubble. After Petitioner's first taped statement, Shimko told Petitioner's wife privately, and later Petitioner, that Shimko believed Petitioner participated in the murders. Petitioner requested and received permission to speak privately to his wife. Over the next hour, Petitioner and his wife conferred; periodically interrupted by Shimko and Sergeant Peterson entering the room to speak to them. Finally, Peterson

entered the room and stated "Now Dave, were you or weren't you in the house?". Petitioner broke down, admitted that he was present, and gave a taped, inculpatory statement. On the following day, Petitioner telephoned Shimko to advise him that his statements on the 12th were a lie. Petitioner went to the barracks to retract his initial statement but, when confronted by the State Police, confirmed his statements on the 12th.

Thereafter, Petitioner was arrested and charged with three counts of homicide. He filed a timely motion to suppress the statements of July 12th and July 13th, 1977, alleging that the statements were unconstitutionally obtained. A hearing on Petitioner's

motion was had on November 11, 1977, before the Honorable John A. Walter of the Court of Common Pleas of Lebanon County (a motion for a change of venue was granted due to pervasive pre-trial publicity in Lycoming County). Petitioner's motion to supress the statements was denied, Petitioner was tried, and convicted. Petitioner filed timely post-verdict motions challenging the admissibility of the statements of July 12th and July 13, 1977; which motions were denied by the Court en banc in an Opinion attached hereto as Appendix "C".

Petitioner appealed to the Superior Court of Pennsylvania. In an Opinion filed July 15, 1983, the Superior Court held that the case was controlled by the decision of this Court in Edwards vs. Arizona, 451 U.S. 477 (1981), and that

Petitioner's first taped statement on July 12, 1977 was obtained by the State Police in violation of Petitioner's constitutional right to the assistance of counsel during questioning.

The Commonwealth's Petition for allowance of appeal to the Supreme Court of Pennsylvania was subsequently granted. By Opinion and Order of January 16, 1986, attached hereto as Appendixes "A" and "D", the Supreme Court of Pennsylvania reversed and remanded. The Opinion announcing the judgment of the Court was authored by Justice Rolf Larsen, with two justices joining. Justice Flaherty filed a concurring Opinion, Justice Nix a concurring and dissenting Opinion, and Justices Hutchinson and Zappala separate dissenting Opinions.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The Opinion of the Supreme Court of Pennsylvania filed January 16, 1986, is in direct conflict with this Court's holding in Edwards V. Arizona, 451 U.S. 477 (1981). If this decision of the Supreme Court of Pennsylvania is permitted to stand, Edwards will be a nullity in the Commonwealth of Pennsylvania, and Pennsylvania law enforcement officers will be encouraged to continue custodial interrogation after the accused has asserted the right to speak to counsel.

A brief review of the facts in Edwards is appropriate, since the police misconduct in that matter is less egregious than in the matter at bar. In Edwards, the defendant made a taped

statement presenting an alibi defense, and then sought to "make a deal". After an aborted attempt to contact a county attorney, the defendant stated, "I want an attorney before making a deal". Police properly ceased questioning, and took Edwards to the county jail. On the following morning, Edwards was approached by two detectives who identified themselves, stated that they wanted to speak to the defendant, and informed him of his Miranda rights. The defendant listened to the taped statement of an alleged accomplice, and then made a statement implicating himself in the crime.

This Court cited Miranda V. Arizona, 384 U.S. 436 (1966) for the proposition that an accused has a Fifth and Fourteenth Amendment right to have

counsel present during custodial interrogation. Edwards v. Arizona, 451 U.S. 477, 482 (1981). This Court carefully examined the reasoning of the Arizona Supreme Court below, and noted that the Arizona Court applied an erroneous standard for determining an effective waiver where the accused has invoked his right to counsel. The Arizona Court found the defendant's statement voluntary, but failed to carefully consider whether the defendant understood his right to counsel and intelligently and knowingly relinquished it. In order to ensure that a workable standard be employed to test the voluntariness of the defendant's assertion of his right to counsel, this Court announced that:

> when an accused has invoked his right to have counsel present during custodial interrogation,

> a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.
>
> 451 U.S. at 484-485.

This Court went on to explain that the right of an accused to be free of custodial interrogation after asserting the right to counsel is a matter of constitutional dimension. The Court cited Michigan V. Mosley, 423 U.S. 96 (1975) for the proposition that the Miranda Court distinguished between the procedural safeguards triggered by a request to remain silent and a request

for an attorney. This Court referred to Miranda's "rigid rule that an accused's request for an attorney is per se an invocation of his Fifth Amendment rights," and to the accused's "undisputed right under Miranda to remain silent and to be free of interrogation until he had consulted with a lawyer." Edwards v. Arizona, 451 U.S. 477, 485, citing Fare v. Michael, 442 U.S. 707, 718 (1979) and Rhode Island v. Innis, 446 U.S. 491, 498 (1980).

At the conclusion of the discussion, the Edwards Court stated:

> we reaffirm these views and, to lend them substance, emphasize that it is inconsistent with Miranda and its progeny for the authorities, at their insistence, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.
>
> 451 U.S. at 485.

In a strained attempt to distinguish Edwards, the Supreme Court of Pennsylvania cites at length the recent decision of this Court in Smith V. Illinois, ___ U.S. ___, 105 S.Ct. 490 (1984). Petitioner is constrained to agree with Justice Hutchinson writing in dissent, that the majority turns Smith on its head. In Smith, the defendant requested the assistance of counsel, but also made some indication of his willingness to speak to the police. After some conversation, the defendant made an inculpatory statement. He then reasserted his right to counsel, and questioning ceased. He unsuccessfully attempted to suppress his statement fre-vidence at trial, was convicted, and appealed. The Illinois Supreme Court affirmed his conviction, noted his ambi-guous statements after his assertion of

his right to counsel, and concluded that his request for counsel was "ambiguous". This Court reversed stating that:

> we hold only that, under the clear logical force of settled precedent, an accused's post request responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself. Such subsequent statements are relevant only to the distinct question of waiver.
>
> 105 S.Ct. at 495.

The Smith Court noted that the rigid prophylactic rule of Edwards v. Arizona embodies a two-prong test. First, it must be determined whether the accused asserted his right to counsel. If so, his responses to further questioning are inadmissible unless he (a) initiated further discussions with the police, and (b) knowingly and

intelligently waived the right he had invoked. Smith v. Illinois, _____ U.S. ____, 105 S.Ct. 490, 493 (1984).

This Court's rational for keeping the first and second inquiries separate is particularly compelling.

> In the absence of such a bright line prohibition, the authorities, through 'badgering' or 'overreaching' - explicit or subtle, deliberate or unintentional - might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance. (Citations deleted)
>
> 105 S.Ct. at 494-495.

In the Opinion attached hereto as Appendix B, the Superior Court of Pennsylvania sets forth at Pages 13-16, the testimony of Trooper Shimko of the Pennsylvania State Police regarding petitioner's assertion of his right to

counsel. In the interest of brevity, the testimony will be merely summarized. Petitioner's wife turned to petitioner and said, "Dave, I think you better get a lawyer." The petitioner responded, "I want a lawyer." Later, the petitioner said, "I want a public defender." The Trooper advised petitioner, "you can call whoever you want to call. I do not believe a public defender will come out to talk to you because you were not arrested." Petitioner responded, "I want to call Mr. Felix." Petitioner attempted to contact Attorney Felix, but was unsuccessful. Petitioner telephoned his Probation Officer, spoke to him, spoke again to his wife, and then made the first taped statement to the State Police.

Despite the clear invocation of

petitioner's right to counsel, the Pennsylvania Supreme Court concluded that:

> . . . the record does not establish that appellee 'clearly and unequivocally invoked his right to counsel' so as to trigger Edwards' prophylactic prohibition."
>
> Commonwealth v. Hubble, ___ Pa. ____, Opinion announcing the Judgment of the Court, January 16, 1986, Appendix A attached hereto, at Page 8.

This conclusion by the Pennsylvania Supreme Court not only defies logic, but is in shocking contrast to the conclusion of the Superior Court of Pennsylvania that:

> The record in this case establishes beyond peradventure of a doubt that appellant had clearly and unequivocally invoked his right to counsel and after he had attempted, unsuccessfully, to reach counsel by telephone, he was questioned further by Trooper Shimko. That he had

> responded to such police-initiated questioning does not establish a waiver of the right to counsel previously invoked.
>
> Commonwealth v. Hubble, 318 Pa. Super 76, 89, 464 A.2d 1236, 1242-1243 (1983).

Petitioner can fashion no better language to illustrate the flawed reasoning of the majority of the Pennsylvania Supreme Court below than the language chosen by Justice Hutchinson in dissent.

> I agree that this case is controlled by Smith. However, its analysis of that case seems to me to stand Smith on its head. Here appellee clearly indicated that he wanted the assistance of counsel before he gave his statement. Even if the subsequent circumstances set out in the opinion announcing the judgment of the Court show an ambiguity in his request instead of his reliance on the police's statement that the public defender could not help him because he was not in custody, they are post-request

> irrelevancies on the issue of ambiguity, according to the teaching of the United States Supreme Court in Smith. Using them to cast doubt upon appellee's initial request for counsel is against both the spirit and letter of Smith.
>
> Commonwealth v. Hubble ____ Pa. ____, Dissenting Opinion of Justice Hutchinson, January 16, 1986, Appendix "A" attached hereto, at page 5.

Petitioner respectfully requests this Court issue a Writ of Certiorari to the Supreme Court of Pennsylvania to correct that Court's misapplication of this Court's holdings in Edwards v. Arizona, 451 U.S. 477 (1981), and Smith v. Illinois, ____ U.S. ____, 105 S.Ct. 490 (1984), thereby restoring the vitality of those decisions in the Commonwealth of Pennsylvania.

After an eight-page strained explanation of its position that this

matter is not controlled by Edwards, the Pennsylvania Supreme Court states at Page 16 of its Slip Opinion that:

> even if Edwards applies, 'suppression of Appellee's confessions would still be unwarranted because, under the circumstances, Appellee (1) initiated [further communication, exchanges, or conversations with the police] and (2) knowingly and intelligently waived the right to counsel.'
>
> Commonwealth v. Hubble, Pa. ___, Opinion announcing the Judgment of the Court, January 16, 1986, Appendix A attached hereto, at Page 20.

The Supreme Court cites as authority for this alternate position the recent decision of this Court in Oregon v. Bradshaw, 462 U.S. 1039 (1983). What the Supreme Court of Pennsylvania altogether ignores is that in Oregon v. Bradshaw, when the defendant asserted his right to counsel before further questioning, questioning

ceased. Later the defendant reinitiated the conversation, was advised by the police officer "you do not have to talk to me", said he understood and continued in a discussion in the course of which the defendant agreed to take a polygraph examination. That factual setting, wherein the defendant himself approached the officer to reinitiate the discussion, is altogether unlike the facts in the matter at bar. Here, Trooper Shimko never ceased his interrogation of the petitioner, through petitoner's assertion of his right to counsel, and various private discussions with his wife. As the Superior Court recognized, State Police troopers entered the room several times while petitioner was attempting to have a private discussion with his wife. Finally, Sergeant Peterson stated, "Now Dave,

were you or weren't you in a house?" It was at that point that the petitioner broke, admitted he was present, and gave his second taped statement. It is clear beyond question that Petitioner did not "reinitiate" contact with the State Police, since the State Police interrogation simply never ceased. Exactly that conclusion was reached by Justice Hutchinson in dissent:

> Appellee's request to speak with his wife was not an initiation of further communication with police. A request to speak to one's spouse, albeit in a police station, is not an initiation of a commumication with the police which they have an opinion to convert into a knowing, voluntary and intelligent waiver of Appellee's Fifth Amendment Right to counsel . . . Appellee did not speak to the police, he asked to speak to his wife. The police interrupted them and directly interrogated him in the absence of counsel, after counsel was requested.

> Appellee's confession followed direct questioning subsequent to his clear invocation of his right to counsel. Under Miranda, if appellee was in fact in custody, under the Beckwith standards, all interrogation must cease after that invocation.
>
> Commonwealth v. Hubble ___ Pa. ___ , Dissenting Opinion of Justice Hutchinson, January 16, 1986, Appendix "A" attached hereto, at pages 7-8.

Thus, since Petitioner asserted his right to counsel, and never reinitiated conversation with the State Police, (since interrogation by the State Police never ceased), Petitioner's first taped statement was obtained by the Pennsylvania State Police in violation of Petitioner's constitutional right to have counsel present during questioning.

In a last ditch effort to affirm Petitioner's conviction, the Pennsylvania Supreme Court stated that, even if Petitioner's first taped state-

ment was unconstitutionally obtained, its introduction into evidence at trial was harmless error given the existence of the second taped statement on July 12, 1977, and Petitioner's statement on July 13, 1977. In the course of this analysis, however, the Pennsylvania Supreme Court either overlooks or ignores the plain fact that Petitioner's second statement on July 12th and statement on July 13th were direct fruits of the first illegally obtained statement on July 12th. Since the second and third statements were obtained by the State Police through exploitation of the initially illegally obtained statement, they too are subject to suppression pursuant to the doctrine fashioned by this Court in Wong Sun v. United States, 371 U.S. 471 (1963), and further defined in Brown v. Illinios, 422 U.S. 590 (1985).

The Supreme Court of Pennsylvania bases its "harmless error" conclusion in the decision of this Court in Oregon v. Elstad, ____ U.S. ____, 105 S.Ct. 1285 (1985). Unfortunately, the Pennsylvania Supreme Court completely misses the rationale of Elstad. In that decision, this Court held that an initial statement of the accused in custodial interrogation without the benefit of Miranda will be inadmissible, but will not taint a subsequent statement made by the accused with the benefit of Miranda. This Court explained in Elstad that the rationale is grounded upon the fact that the Miranda warnings are not a matter of constitutional protection. In the case at bar, Petitioner was denied his constitutional right to counsel during questioning. Two subsequent statements were received by the State Police by the

exploitation of the initial constitutional illegality. Justice O'Connor's rationale in Elstad clearly makes a distinction between the non-constitutional Miranda violation, and a constitutional deprivation such as that suffered by petitioner.

> If errors are made by law enforcement officers in administering the prophylactic Miranda prodecures, they should not breed the same irremedial consequences as police infringement of the Fifth Amendment itself.
>
> 105 S.Ct. at 1293.

The plain fact of the matter is that Petitioner was subject to custodial interrogation by the Pennsylvania State Police which was continued in spite of Petitioner's request for the assistance of counsel. Petitioner was eventually talked into making a taped statement. After his first statement, it was

suggested to Petitioner that he was being untruthful. After several private conferences with his wife, interrupted by intermittent State Police questioning, Petitioner was confronted by Sergeant Peterson. Petitioner admitted that he was in the house, and broke down. Thereafter he gave a second taped statement, clearly a fruit of the first. On the following day, he contacted the State Police to retract his first and second statements. He arrived at the State Police barracks, was confronted by the State Police, and reaffirmed rather than retracted the first two statements. One must bend logic to the breaking point to arrive at any conclusion other than the first statement was illegal and the second and third statements were fruits of the

first. Under these facts, none of Petitioner's three statements pass constitutional muster.

CONCLUSION

Since petitioner's initial July 12, 1977 statement was obtained by the Pennsylvania State Police by continued custodial interrogation after he asserted his right to counsel, and since petitioner's two subsequent statements were procured by the State Police through the exploitation of the inital illegally obtained statement, petitioner is entitled to the new trial granted him by the Superior Court of Pennsylvania in its Order of July 15, 1983.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, ROBERT B. ELION, ESQUIRE, attorney for Petitioner, David E. Hubble, hereby certify that two (2) copies of the within Petition For A Writ Of Certiorari and Appendices were served upon Brett O. Feese, Esquire, Lycoming County District Attorney on Monday, March 24, 1986 by personal service.

Robert B. Elion #21030
Attorney for Petitioner

Appendix "A"

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DIVISION

COMMONWEALTH OF PENNSYLVANIA, Appellant	:	NO. 25 EASTERN DISTRICT APPEAL DOCKET, 1984
	:	APPEAL FROM JUDGMENT OF SUPERIOR COURT OF PENNSYLVANIA AT NO. 144, PHILADELPHIA, 1981, DATED JULY 15, 1983 318 PA. SUPER. CT. 76, 464 A.2d 1236 (1983)
v.	:	
DAVID E. HUBBLE, Appellee	:	ARGUED: DECEMBER 7, 1984

OPINION ANNOUNCING THE JUDGMENT
OF THE COURT

JUSTICE ROLF LARSEN*

FILED: January 16, 1986

We granted the Commonwealth's peti-

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*This case was reassigned to this author on September 15, 1985.

tion for allowance of appeal in this case to determine whether the Superior Court erred in awarding appellee a new trial on the grounds that his confession should have been suppressed under the principle enunciated by the United States Supreme Court in Edwards v. Arizona, 451 U.S. 477 (1981), reh'g. denied 452 U.S. 973 (1981). A majority of this Court agrees that Edwards does not require suppression of appellee's confession and we therefore reverse the Superior Court.

On August 5, 1976, the bodies of Mrs. Claire Kepner and her two young children were discovered in their home near Muncy in Lycoming County. All had been shot with a .32 caliber gun and one of the children had been slashed

with a knife.[1] These three homicides engendered an intensive investigation by the Pennsylvania State Police which culminated with the arrests of David Hubble, appellee, as well as his brother, Robert K. Hubble, and Milton Scarborough.

Appellee was first interviewed by state troopers regarding the homicides in April of 1977 and then on several occasions in July. The events

---

1. The macabre happenings of this multiple homicide are set forth more fully in Commonwealth v. Robert Kelsey Hubble, ____ Pa. Super. ____, 460 A.2d 784 (1983) and Commonwealth v. Scarborough, ____ Pa. Super. ____, 460 A.2d 310 (1983) and need not be repeated herein. In these cases, the convictions of appellee's co-defendants, who were separately tried, were affirmed by the Superior Court. This Court denied co-defendants' petitions for allowance of appeal on October 12, 1983.

underlying the suppression matter occurred principally on July 12th and 13th, and briefly, took place as follows. On July 12, 1977, appellee and his wife voluntarily accompanied Troopers John S. Shimko and Chester J. Zaremba to the State Police Barracks in Montoursville. At approximately 2:15 p.m., appellee gave a taped statement to the troopers which was not self-incriminating; this statement reiterated what appellee had previously informed the troopers regarding his brother's involvement in the homicides. Subsequently, in the process of leaving the barracks to be returned to their home, appellee and his wife indicated

that they wished to speak with each other and were given an opportunity to do so. At approximately 5:45 p.m., appellee gave a second taped statement to the police, this time inculpating himself in the homicides. Appellee and his wife were then returned to their home.

The following day, appellee telephoned Trooper Shimko and informed him that everything he had told Shimko the previous day was a lie. However, upon voluntarily returning to the barracks with his wife on July 13th, appellee admitted that his July 12th confession had been truthful and he essentially reitereated that confession. Prior to each statement, and on several

occasions previous to July 12th, appellee had been advised of his Miranda rights[2] and had signed a written waiver of those rights.

Appellee moved to suppress these statements of July 12-13, 1977 and a lengthy pretrial suppression hearing was conducted on November 11, 1977 before the Honorable John A. Walter in the Court of Common Pleas of Lebanon County.[3] The court denied appellee's motion to suppress and the case was tried before a jury. On November 25, 1977, the jury found appellee guilty of robbery, burglary, theft, conspiracy and three counts of murder of the second

---

2. Miranda v. Arizona, 348 U.S. 436 (1966).

3. Because of pervasive pretrial publicity in this case and that of appellee's co-defendants, this Court ordered a change of venue on October 13, 1977.

degree. Appellee filed post-verdict motions which were denied by the court en banc. In his opinion for the court en banc, Judge Walter stated:

> Defendant first contends that the Court erred in failing to grant his motion to suppress incriminating statements taken from him by the police. Specifically, defendant alleges that on July 12, 1977, he was subject to custodial interrogation calculated to evoke admissions without being adequately informed of his right to counsel and in the absence of an intelligent, informed waiver of such right.
>
> a.
>
> We must first determine whether or not defendant was subject to custodial interrogation on July 12, 1977. The test for determining whether a person is in custody for Miranda purposes is whether he "... is physically deprived of his freedom in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or movement is restricted by such interrogation ..."

Commonwealth v. Romberger, 454 Pa. 279, 283, 312 A.2d 353, 355 (1973). (footnote omitted)

Slip opinion of court en banc at 1-2.

Because appellee had been subjected to a polygraph examination and to intermittent questioning over an eight hour period by Pennsylvania State Police officers at the police barracks on July 12, 1977, the court en banc concluded that appellee had been in custody. That court cited and discussed Commonwealth v. Brown, 473 Pa. 562, 375 A.2d 1260 (1977) to support its view that a reasonable person in appellee's situation would have "perceived the restraint of his freedom." Id.

Having determined that appellee had been in custody, the court then examined the nature of the questions and statements posed to him by various state

troopers, determined that appellee had been "subject to police conduct calculated to or likely to evoke admissions," and held that appellee had been subject to interrogation. Id. at 3-5, citing Commonwealth v. Simala, 434 Pa. 291, 252 A.2d 575 (1969) and Commonwealth v. Yount, 455 Pa. 303, 314 A.2d 242 (1974). Thus the court held that appellee had been subjected to "custodial interrogation" for Miranda purposes.

The court further found that appellee had been adequately advised of his Miranda rights, that he knowingly, voluntarily and intelligently waived his right to remain silent and to have counsel present during questioning, and that, considering the "totality of the circumstances," his confession was the "product of a 'free and unconstrained choice.'" Id. at 5-9. Accordingly, the

court en banc affirmed the denial of appellee's motions as well. Appellee appealed that denial to the Superior Court, which reversed and remanded for a new trial.

Initially, the Superior Court identified that appropriate standards of appellate review of a suppression court's rulings:

> On review, our responsibility is 'to determine whether the record supports the factual findings of the court below and the legitimacy of the inferences and legal conclusions drawn from those findings.' Commonwealth vs. Goodwin, 460 Pa. 516, 521, 333 A.2d 892, 895 (1975).
>
> "If the suppression court has determined that the evidence is admissible, 'this Court will consider only the evidence of the prosecution's witnesses and so much of the evidence for the defense as, fairly read in the context of the record as a whole, remains uncontradicted.' Commonwealth v. Kichline, 468 Pa. 264, 280,

361 A.2d 282, 290 (1976); see Culombe v. Connecticut, 367 U.S. 568, 604, 81 S.Ct. 1860, 1878, 6 L.Ed.2d 1037 (1961) (Opinion of Frankfurter, J.)" Commonwealth v. Brown, 473 Pa. 562, 566, 375 A.2d 1260, 1262 (1977).

464 A.2d at 1237. After examining the record pertaining to the events of July 12, 1977, the Superior Court affirmed the lower court's finding of custodial interrogation, stating:

> The suppression court held that [appellee] had been subjected to custodial interrogation on July 12, 1977 for Miranda purposes and that the investigation officers had engaged in interrogation and conduct calculated to or likely to evoke admissions. We agree with these legal conclusions. They are based upon the court's findings of fact and are amply supported by the record. See: Commonwealth v. Chacko, 500 Pa. 571, _____, 459 A.2d 311, 314-316 (1983) (numerous further citations omitted). The suppression court determined further that [appellee] had been adequately

> advised of his right to appointive counsel and that he had voluntarily and knowingly waived his right to such counsel. We are bound by the court's findings of fact where, as here, they are supported by the record."

Id. at 1240. (citations omitted).[4]

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4. The Commonwealth vigorously argues that we should reverse the determination of the Superior Court, affirming that of the suppression court, that appellee had been in custody when he rendered the challenged statements of July 12, 1977. The Commonwealth states: "No formal arrest occurred nor was there any restraint on [appellee's] freedom associated with a formal arrest, No coercive atmosphere was present and a reasonable person could not have concluded that his freedom of action was being restricted." Brief for appellant at 35. The argument is predicated primarily on the fact that appellee and his wife voluntarily went with police to the barracks, knew that they were free to leave at any time (according to the troopers' testimony), and in fact were in the process of being taken home at one point when they decided to stay and, eventually, confess.

While this argument is not without merit it emphasizes the factors on the

Nevertheless, the Superior Court reversed and awarded appellee a new trial based upon its understanding that appellee's waiver of his right to counsel was ineffective as a matter of law under Edwards v. Arizona, 451 U.S. 477 (1981), reh'g denied 452 U.S. 973 (1981), and that, therefore, his confession should have been suppressed. This holding is wrong.

In Edwards, the United States Supreme Court held that:

> when an accused has invoked his right to have counsel present

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Footnote 4 continued

"non-custodial" side of the ledger to the exclusion of the factors on the "custodial" side. While this Court perhaps might have reached a different conclusion based on these factors, the suppression court's conclusion tht appellee had been in custody is supported by record evidence, and the Superior Court, therefore, properly affirmed.

> during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.
>
> ....We...emphasize that it is inconsistent with Miranda and its progeny for the authorities, at their instance, to reinterrrogate and accused in custody if he has clearly asserted his right to counsel.

451 U.S. at 484-85 (footnote omitted).

In reliance upon Edwards, the Superior Court held, in the instant case:

> The record in this case establishes beyond peradventure of a doubt that after appellant had clearly and une-

> quivocally invoked his right to counsel and after he had attempted, unsuccessfully, to reach counsel by telephone, he was questioned further by Trooper Shimko. That he responded to such police-initiated questioning does not establish a waiver of the right to counsel previously invoked. "For a waiver . . . to be effective, the reversal of the defendant's position must have been inititated by him." (citation omitted) Here, it was not appellant who, after asserting his rights, indicated a desire to waive them without further activity on the part of the police. Instead, it was the police who initiated the chain of events which culminated in appellant's inculpatory statement. This was improper. Appellant had requested and was entitled to have counsel present. His statement given in response to police questioning and without counsel should have been suppressed.

464 A.2d at 1242-43.

The Superior Court's reliance on Edwards to suppress appellee's statement is misplaced because, despite that

court's strong language to the contrary, the record does not establish that appellee "clearly and unequivocally invoked his right to counsel" so as to trigger Edwards' prophylactic prohibition against all furhter police-initiated conversation.[5] As the United States Supreme Court recently stated:

> This "rigid" prophylactic rule [enunciated in Edwards v. Arizona] embodies two distinct inquiries. First, courts must determine whether the accused actually invoked his right to counsel. See, e.g., Edwards v. Arizona, supra., 451 U.S.,

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5. The United States Supreme Court has recently determined that its decision in Edwards v. Arizona is to be retroactively applied to cases that were on direct appeal in the state courts at the time of that decision on May 18, 1981. Shea v. Louisiana, ____ U.S. ____, 105 S.Ct. 1065 (1985). But cf. Solem v. Stumes, ___ U.S. ____ 104 S.Ct. 1338 (1984) (Edwards is not to be applied retroactively to cases pending collateral review after conviction is made final following affirmance on direct appeal.)

at 484-485, 101 S.Ct. at 1184-1185 . . . . Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked. Edwards vs. Arizona, supra, 451 U.S., at 485, 486, n. 9, 101 S.Ct., at 1885, n. 9.

This case concerns the threshold inquiry: whether Smith invoked his right to counsel in the first instances. On occasion an accused's asserted request for counsel may be ambiguous or equivocal. As the majority and dissenting opinions below noted, courts have developed conflicting standards for determining the consequences of such ambiguities. (citations and footnote omitted). We need not resolve this conflict in the instant case, however, because the judgment of the Illinois Supreme Court must be reversed irrespective of which standard is applied.

The conflict among courts is addressed to the relevance of alleging ambiguities or equivocations that either (1) precede an accused's purported

> request for counsel, or (2) are part of the request itself. Neither circumstances pertains here, however.

Smith v. Illinois, ____ U.S. at ____, 105 S.Ct. at 492-93.

Because the Illinois Supreme Court had inferred ambiguity into Smith's otherwise unequivocal request for counsel from his responses to subsequent police questioning, the United States Supreme Court reversed, holding that "[w]here nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease." Id. at ____, 105 S.Ct. at 494.

As in Smith, the instant case concerns the threshold inquiry, i.e., whether appellee had invoked his right to counsel. Unlike Smith, however, the

nature of appellee's "request for counsel" and the circumstances preceding such "request" were indeed equivocal and demonstrate that, in fact, appellee did not invoke his right to counsel. We do not, therefore, cross the Edwards threshold.

Prior to July 12, 1977, the date on which appellee's challenged confession was rendered, appellee had been interviewed by state troopers on several occasion, and on each occasion expressly waived his Miranda rights, including his right to counsel. Appellee had also been previously acquainted with his Miranda rights due to three prior arrests and convictions following guilty plea proceedings which included full colloquies at which appellee indicate that he knew and understood his rights. On July 12th, appellee was again given

Miranda warnings several times and again signed written waiver forms and demonstrated a willingness to talk freely. For most of the day and at all important times that day, appellee was accompanied and advised by his wife, Virginia Hubble.

At approximately 2:00 p.m., according to the testimony of Trooper Shimko, the following occurred. Trooper Shimko asked appellee if he would be willing to give a tape-recorded statement, at which point Virginia Hubble suggested to appellee, "I think you better get a lawyer." Appellee then stated, "I want a lawyer," followed by, "I want a public defender." At that point, Trooper Shimko responded:

> Dave, you can call whoever you want to call. I do not believe that a public defender will come out to talk to you

> because you were not arrested. We are not accusing you of any crime. We're talking about what Bob had told you. This is all we're concerned with at this particular time, but you are willing or you're able to call whoever you wish to call.

Notes of Testimony, Suppression Hearing, November 11, 1977 at 114a; see also N.T. at 117a (on cross-examination).

Although the trooper's statement regarding the availability of the public defender was erroneous and potentially misleading, the clear import of his response was that appellee could contact the public defender if he wished. Appellee's wife testified that she was aware, despite the trooper's comments, that her husband had a right to have counsel present. N.T. at 273a-74a. It is also apparent that appellee was not misled, because he next told Trooper

Shimko that he wanted to call Mr. Jack Felix, a former public defender who had represented him in his previous difficulties with the law. The trooper looked up Mr. Felix's telephone number and appellee called this attorney's office but was informed that he was not available.

Appellee then stated his desire to call his probation officer, Mr. Dave McCool, which he did. Appellee reached Mr. McCool at his residence. McCool testified that he told appellee he did not know if a public defender would come out to the police barracks, but he encouraged appellee to call the public defender's office. N.T. at 251a. Despite being advised to do so by both Trooper Shimko and Mr. McCool, and having every opportunity to do so, appellee did not contact the public

defender's office nor did he make or request to make any further telephone calls.

Trooper Shimko again asked appellee if he would give a taped statement, which appellee agreed to do. This taped statement did not inculpate appellee. After that statement was given, Trooper Shimko advised appellee and Mrs. Hubble that he would take them home. According to Trooper Shimko and Mrs. Hubble, they and appellee walked down the hallway with their coats on and were about to leave the barracks when appellee stated that he wanted to first speak with his wife. N.T. at 122a-123a. Appellee and Mrs. Hubble were then left alone to talk. Several times, Trooper Shimko stopped in and asked, "What are you going to do here? Do you want to go home? Do you want to talk?" N.T. at

123a.

After about forty-five minutes, Trooper Shimko and another officer told appellee and his wife that they had information placing appellee at the scene of the crime. Appellee's wife then gave the officers an account of events that corresponded to that information. Appellee again conferred privately with his wife for approximately one-half hour until Tooper Shimko asked appellee whether he had participated in the crime. At that point, appellee gave the taped confession which the Superior Court held must be suppressed under Edwards.

Under all of these circumstances which appear of record, the appellee did not invoke his right to counsel. What appellee did request was to call a particular attorney, which he did with

Trooper Shimko's assistance, and to call his probation officer, which he did. While he had full opportunity to do so, appellee did not heed the advise given him to contact the public defender's office. Moreover, appellee initiated the events which lead to his inculpatory statement, since the prior interview had ended and appellee and Mrs. Hubble were in the process of leaving the barracks when appellee requested to stay and talk with his wife privately. These circumstances leading up to and surrounding appellee's requests to call "a lawyer", then Mr. Felix and Mr. McCool do not present the situation or the type of police conduct condemned in Edwards v. Arizona.

The United States Supreme Court

stated in Smith v. Illinois, supra:

> Our decision is a narrow one. We do not decide the circumstances in which an accused's request for counsel may be characterized as ambiguous or equivocal as a result of events preceding the request or of nuances inherent in the request itself, nor do we decide the consequences of such ambiguity or equivocation. We hold only that, under the clear logical force of settled precedent, an accused's post-request responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself. Such subsequent statements are relevant only to the distinct question of waiver.

105 S.Ct. at 495. Although the Court did not decide the issue, it recognized at least three approaches to the problem of the consequences of ambiguity/equivocation in an accused's "request for counsel" taken by various

jurisdictions:

> Some courts have held that all questioning must cease upon any request for or reference to counsel, however equivocal or ambiguous. See e.g. People v. Superior Court, 15 Cal.3d 729, 735-736, 125 Cal.Rptr. 798, 802,803, 542 P.2d 1390, 1394-1395 (1975), cert. denied, 429 U.S. 816, 97 S.Ct. 58, 50 L.Ed.2d 76 (1976); Ochoa v. State, 573 S.W.2d 796, 800-801 (Tex.Crim.App. 1978) Others have attempted to define a threshold standard of clarity for such requets, and have held that requests falling below this threshold do not trigger the right to counsel. See, e.g. People v. Krueger, 82 Ill.2d 305, 311, 45 Ill.Dec. 186, 189, 412 N.E.2d 537, 540 (1980) ("[A]n assertion of the right to counsel need not be explicit, unequivocal, or made with unmistakable clarity," but not "every reference to an attorney no matter how vague, indecisive or ambiguous should constitute an invocation of the right to counsel"), cert. denied 451 U.S. 1019, 101 S.Ct. 3009, 69 L.Ed.2d 390 (1981). Still others have adopted a third approach, holding that when

> an accused makes an equivocal statement that "arguably" can be construed as a request for counsel, all interrogation must immediately cease except for narrow questions designed to "clarify" the earlier statement and the accused's desires respecting counsel. See, e.g., Thompson v. Wainwright, 601 F.2d 768, 771-772 (CA5 1979); State v. Moulds, 105 Idaho 880, 888, 673 P.2d 1074, 1082 (App. 1983).

105 S.Ct. at 493, n.3 (emphasis added).

The first approach (all questioning must cease upon any mention of counsel no matter how ambiguous or equivocal) is unduly restrictive. As the United States Supreme Court recently stated in the context of analyzing the consequences of procedural Miranda violation, "[f]ar from establishing a rigid rule, we direct courts to avoid one ...." Oregon v. Elstad, 470 U.S. ____, 106 S.Ct. _____, 84 L.Ed.2d 222,

238 (1985). This directive is sage advice in deciding the circumstances in which an accused's requests "for counsel" may be characterized as ambiguous or equivocal, and in determining the consequences of such characterization. To hold that every utterance of the word "lawyer" automatically erects the Edwards' "cone of silence" around the accused, thus insulating him from all further police-iniated questioning and communication, would be far too rigid and would not serve the interests or needs of justice.

Under either of the other two approaches recognized by the United States Supreme Court, appellee's confession need not be suppressed. Appellee initially requested "a lawyer" or "a public defender," but then, after being advised that he could contact the

public defender, requested to contact a particular attorney, and then his probation officer. With the possible exception of the erroneous statement about the public defender, which did not in fact mislead either appellee or his wife regarding appellee's right to counsel, Trooper Shimko scrupulously honored appellee's requests and assisted appellee in placing his telephone calls. Appellee did not attempt to contact the public defender's office though advised and given the opportunity to do so. Neither appellee nor his wife subsequently expressed the desire to speak with an attorney. From the foregoing, I would hold that appellee's requests did not pass the threshold level of clarity that trigger the Edwards prophylactic rule and that the subsequent conduct of the police officers following

appellee's equivocal request demonstrates a good faith, reasonable effort to comply with appellee's desires and to honor his right to counsel.

Moreover, were we to agree with the Superior Court that appellee's ambiguous request invoked his right to counsel in a manner clear enough to trigger Edwards, suppression of appellee's confessions would still be unwarranted because, under the circumstances, appellee (1) initiated "further communication, exchanges, or conversations with the police", and (2) knowigly and intelligently waived the right to counsel. Edwards v. Arizona, supra 451 U.S. at 485, 486 n.9.

In Oregon v. Bradshaw, 462 U.S. 1039, 103 S.Ct. 2830 (1983), the defendant had stated during custodial

interrogation, "I do not want an attorney before it goes very much further." The interrogation then ceased. Subsequently, while being transported to another jail, the defendant asked "Well, what is going to happen to me now?" The police officer responded that the defendant need not talk to him since defendant had requested an attorney, but then suggested that the defendant take a polygraph examination. The next day, the defendant was readvised of his Miranda rights, waived them, and took the polygraph. After being told that he did not seem to be telling the truth, the defendant confessed. Id. at 103 S.Ct. 2833.

The Oregon Court of Appeals reversed defendant's conviction "holding that [the] inquiry he made of a police officer at the time he was in custody

did not 'initiate' a conversation with the officer, and that therefore statements by the [defendant] growing out of that conversation should have been excluded from evidence under Edwards v. Arizona." Id. at 103 S.Ct. 2832. A majority of the United States Supreme Court reversed the Oregon court and held that Edwards did not require suppression of the confession. Justice Rehnquist wrote the plurality opinion (joined by the Chief Justice, Justice White and Justice O'Connor; Justice Powell agreed that Edwards did not require suppression of the confession and filed a concurring opinion) in which he held that Edwards had been misapplied because the defendant had indeed initiated further "communication, exchanges, or conversation with the police," stating:

> There can be no doubt in this case that in asking,

"Well. what is going to happen to me now?", respondent "initiated" further conversation in the ordinary dictionary sense of that word . . .

Although ambiguous, the respondent's question in this case as to what was going to happen to him evinced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship. . . . On these facts we believe that there was not a violation of the Edwards rule.

Since there was no violation of the Edwards rule in this case, the next inquiry was "whether a valid waiver of the right to counsel and the right to silence had occurred, that is, whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities." Edwards v. Arizona, 451 U.S. at 486, n. 9, 101 S.Ct. at 1885, N. 9. As we have said many times before, this determination

> depends "upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused."

Id. at 103 S.Ct.-2835 (citations omitted). Justice Rehnquist further stated that "initiation of further conversation" requirement of Edwards was "designed to protect an accused in police custody from being badgered by police officers in the manner in which the defendant in Edwards was." Id. at 103 S.Ct. 2834. Justice Powell agreed that the defendant's confession should not have been suppressed under Edwards, but filed a concurring opinion because he would not apply the majority's two-step analysis in waiver of right to counsel cases. Justice Powell would simply apply the Zerbst-waiver standard

(Johnson v. Zerbst, 304 U.S. 458 (1938)) to determine whether a defendant's waiver of his right to counsel was knowing and intelligent, and would consider the fact of initiation of subsequent conversation as one of the factors to be considered. 103 S.Ct. at 2836-38. Justice Powell found that the defendant had made a valid waiver of his right to counsel. Id.

Applying Oregon v. Bradshaw to the instant case, it is apparent that Edwards does not require suppression of appellees' confessions. As set forth more fully above, appellee initiated the events which culminated in his confessions. Slip opinion at 12-13. Rather than return home, appellee asked to speak in private with his wife at the police barracks which he did at length, despite being asked several times

whether he wanted to to home or talk. Under the circumstances, appellee was hardly "badgered by police officers in the manner in which the defendant in Edwards was"; instead, appellee "initiate[d] further communication, exchanges, or conversations with the police." Oregon v. Bradshaw, supra at 103 S.Ct. 2834.

Since appellee initiated further communication, we must examine the totality of the circumstances to determine whether there was a knowing, intelligent and voluntary waiver of his right to remain silent and his right to counsel. Id at 2835, 2838; Johnson v. Zerbst, supra. In examining the totality of the circumstances surrounding a confession, this Court has looked to a myraid of factors including the duration and methods of interrogation, the conditions

of detention, the manifest attitude of the police toward the accused, the accused's physical and psychological state, and "all other conditions present which may serve to drain one's powers or resistance to suggestion and undermine his self-determination." Commonwealth v. Crosby, 464 Pa. 337, 346 A.2d 768 (1975). Regarding the validity of a waiver of the right to counsel, once a suspect has ambiguously requested to contact an attorney, a factor is, of course, whether the suspect or the police have initiated subsequent conversation leading to the incriminating statement. Commonwealth v. Youngblood, 453 Pa. 225, 307 A.2d 922 (1973); Commonwealth vs. Scarborough, 491 Pa. 300, 421 A.2d 147 (1980). However, this is only one factor, albeit an important one, in the evaluation of whether the

right to counsel was knowingly, intelligently and voluntarily waived. Id.

Based upon the totality of the circunstances, we affirm, as did the Superior Court, the lower court's findings and conclusion that appellee knowingly, voluntarily and intelligently waived his right to counsel.

Finally, we note that, even if we considered appellee's first statement on July 12, 1977 to be inadmissible under Edwards, the introduction of that non-inculpatory statement against him at trial was harmless error and his other challenged statements of July 12th and 13th would nevertheless remain admissible. The first statement was not inculpatory and merely reitereated information that appellee had previously given the state troopers. Following that statement, the troopers ended the interview and began to take appellee and

his wife home. Appellee thereafter initiated the subsequent events which lead to his second statement of July 12th and his third statement of July 13th - his inculpatory confessions.

The taint of any "illegality" associated with the first statement is thoroughly dissipated by this break in the causal connection between the first and the second and third statements. demonstrating that appellee's confessions were not the product of exploitation of the earlier "illegality" and were uncoerced acts of free will. Commonwealth v. Chacko, 500 Pa. 571, 580-82, 459 A.2d 311 (1983) (and see cases cisted therein) ("We concluded that appellant's statement was an act of free will sufficient to break the casual connection between the initial, ille-

gally obtained statement and his subsequent statements. Any taint thus having been purged, the latter statements were properly admitted.").

In Oregon v. Elstad, supra, the defendant had rendered a statement that was ruled inadmissible because of the failure to admisister Miranda warnings, although the statement was otherwise voluntary and not coerced. In holding that subsequent statements rendered after full Miranda warnings were administered were admissible despite the technical illegality of the first unwarned statement, the United States Supreme Court stated:

> Far from establishing a rigid rule, we direct courts to avoid one; there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of Miranda, was voluntary. The relevant inquiry is

whether, in fact, the second statement was also voluntarily made. As in any such inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements. The fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative. We find that the dictates of Miranda and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied in the circumstances of this case by barring use of the unwarned statement in the case in chief. No further purpose is served by inputing "taint" to subsequent statements obtained pursuant to a voluntary and knowing waiver. We hold today that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings.

_____ U.S. at ____, ____ S.Ct. at ____, 84 L.Ed2d at 238. Thus, even assuming arguendo that appellee's first state-

ment was in technical violation of Edwards, his subsequent statements were not "tainted" by that earlier "illegality," were "obtained pursuant to a knowing and intelligent waiver" and were admissible.

For the foregoing reasons, we hold that the Superior Court erred in its determination that appellee was entitled to a new trial because of the introduction of his statements of July 12-13, 1977 against him at trial. Accordingly, we reverse the order of the Superior Court which vacated the judgment of sentence and remanded for a new trial, we we remand this case to the Superior Court for disposition of appellee's remaining allegations of error.

Mr. Justice Papadakos joins in this opinion.

Mr. Justice McDermott joins in this opinion and files a Concurring Opinion.

Mr. Justice Flaherty files a Concurring Opinion.

Mr. Chief Justice Nix files a Concurring and Dissenting Opinion.

Mr. Justice Hutchinson files a Dissenting Opinion.

Mr. Justice Zappala files a Dissenting Opinion.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DIVISION

COMMONWEALTH OF PENNSYLVANIA, Appellant	:	NO. 25 EASTERN DISTRICT APPEAL DKT. 1984
	:	APPEAL FROM JUDGMENT OF SUPERIOR COURT OF PENNSYLVANIA AT NO. 144,
v.	:	PHILADELPHIA,1981, DATED JULY 15, 1983 318 PA. SUPER. CT. 76, 464 A.2d 1236 (1983)
DAVID E. HUBBLE, Appellee	:	ARGUED: DECEMBER 7, 1984

CONCURRING OPINION

MR. JUSTICE McDERMOTT
FILED: JANUARY 16, 1986

The suppression court found two salient facts: one, that appellant was "in custody" when questioned by the

 45A

police; and two, that although he asked for counsel, he voluntarily waived counsel and confessed. Both of these findings were within the responsibility of that court and, while one is not obliged to agree with them, if they are supported by the evidence they are the facts of the case. The Superior Court chose to accept one finding, that appellant was "in custody", and not the other, that the request for counsel was waived. The panel reasoned that while the suppression court's findings are solid rock, they are not required to reach the same conclusion from the same facts. Neither are we. I believe the conclusion reached by the Superior Court panel on the facts presented by the suppression court constituted an unnecessary reach for a view instead of a logic.

Notwithstanding that the appellant confessed on July 12, to a dreadful murder, he was allowed to go home. On July 13, while at home, he told his probation officer, Mr. McCool, who had consulted with him on July 12, that what he told the police on July 12, was a lie. Mr. McCool told him he best tell the police that he lied. Appellant called the police and he and Mr. McCool arranged to meet at the station house. They did, and appellant confessed again. One need not go further. Appellant was literally awash in Miranda warnings; he was allowed home and returned of his own accord, without counsel, either to correct a lie or tell the truth. Whatever his reason, no one forced him. Indeed, the case is sterile of any show of coercion and the suppression court so found. It is a salutary rule that once

counsel is requested, all questioning initiated by the police should cease. The ought not however, be required to shun prospective confessees who wish, on their own, to set the record straight.

I join in the Opinion of Mr. Justice Larsen.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DIVISION

COMMONWEALTH OF PENNSYLVANIA, Appellant	:	NO. 25 EASTERN DISTRICT APPEAL DOCKET, 1984
	:	APPEAL FROM JUDGMENT OF SUPERIOR COURT OF PENNSYLVANIA AT NO. 144,
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DAVID E. HUBBLE, Appellee	:	ARGUED: DECEMBER 7, 1984

CONCURRING OPINION

MR. JUSTICE FLAHERTY
FILED: JANUARY 16, 1986

I agree with Mr. Justice Larsen that Superior Court must be reversed, but I write separately because my analysis of the case is somewhat different from that of the Opinion Announcing the

Judgment of the Court.

It is easy to lose sight of the fact that the purpose of the rule articulated in Miranda v. Arizona, 384 U.S. 436 (1966), and its progency was to protect a citizen's Fifth Amendment rights to silence and counsel against the overreaching of police. The United States Supreme Court has described the purpose of the Miranda rule as protecting against "'the overbearing compulsion . . . caused by insolation of a suspect in police custody, '" Minnesota v. Murphy, ___ U.S. ____, 104 S.Ct. 1136, 1144, (1984), and this Court has stated: "The protection of Miranda was designed to shield an accused from the coercive atomsphere of 'custodial interrogation' where the accused might reasonably believe that he would be held incommunicado and not be released

before confessing to a crime." Commonwealth v. Ziegler, ___ Pa. ____, 470 A.2d 56 (1983). In general terms, of course, that is also the message of Edwards v. Arizona, 451 U.S. 477 (1981), requiring that police questioning must end when a suspect, held in police custody, requests legal counsel. It will be recalled from Miranda, however, that in order for the warnings of Miranda to be required, the person must be subjected to custodial interrogation. Custodial interrogation is also a predicate of the Edwards case.

In the present case, the findings of the lower courts notwithstanding, Hubble was not in custody. Police testimony was that just before Hubble gave his inculpatory statement, police told him, "If you want to go home, we'll

take you home." N.T. 125. (Hubble did not own a car.) Hubble himself testified that the police told him that if he made a statement, police would allow him to go home. N.T. 326-327. Moreover, it was only because Hubble and his wife insisted on staying in the state police barracks, as they were on their way out the door to be taken home, that the confession of July 12, 1977 occurred at all. And when Hubble called an advisor (his probation officer) from the police station, the probation officer, testified: "I told him that I wasn't sure whether [the public defender's office] would represent him until he was arrested or not, but I told him to call them to find out." N.T. 251. (Emphasis added). On these facts, it cannot be said that Hubble was in custody. He was being taken home when

he insisted on staying in the police facility, where he subsequently gave a confession; just before he gave the confession, police offered to take him home; neither the police nor Hubble's own advisor thought that he had been arrested; and Hubble himself testified that after making statement he expected to be taken home.

There is a certain humor, in fact, in the lower courts' findings that Hubble was in custody. One envisions a cartoon in which police are carrying an unwilling citizen to the porch of his home, where they deposit him in a chair, and the citizen is protesting, "Please, don't force me to incriminate myself by keeping me in this awful place, separated from my familiar surroundings and the support and counsel of my family." I would hold, as a matter of

law, that Hubble was not in custody.

If Hubble was not in custody at the time of his interrogation, then neither Miranda nor Edwards are applicable and the incuplatory statements were properly admitted into evidence.

Even if there were some question as to custody, however, I concur with the view of Mr. Justice Larsen that Edwards does not require a reversal of the conviction. Assuming that Hubble asked for a lawyer on July 12, 1977 and that his statement to police on July 12, 1977 should be suppressed because police questioning continued in spite of the request for legal assistance, Hubble's phone call to police on July 13th, under Edwards, re-opened legitimate police questioning. As Edwards states, once counsel has been requested, the suspect is not subject to further custodial

interrogation "unless the accused himself initiates further communication, exchanges, or conversations with the police." 451 U.S. at 485, 69 L.Ed.2d at 386.

Here, Hubble initiated further conversations with police and it was proper for police to once again question him. Therefore, the subsequent confession of July 13, which was given freely and after renewed Miranda warnings, reaffirmed the confession of July 12, and would be admissible (along with the text of the July 12 confession). I quite agree with Mr. Justice Larsen that the fact that Hubble "let the cat out of the bag" on July 12 during what was, for the sake of argument, an improper police questioning, does not preclude the use of the July 12 confession where it was subsequently ratified during permissible

not live with the secret that he had participated in a terrible crime.

I join in reversing the order of the Superior Court.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DIVISION

COMMONWEALTH OF PENNSYLVANIA, Appellant	:	NO. 25 EASTERN DISTRICT APPEAL DOCKET, 1984
	:	APPEAL FROM JUDGMENT OF SUPERIOR COURT OF PENNSYLVANIA AT NO. 144,
v.	:	PHILADELPHIA, 1981, DATED JULY 15, 1983 318 PA. SUPER. CT. 76, 464 A.2d 1236 (1983)
DAVID E. HUBBLE, Appellee	:	ARGUED: DECEMBER 7, 1984

CONCURRING AND DISSENTING OPINION

NIX, C. J. FILED: JANUARY 16, 1986

I agree with the majority that there is a legitimate question regarding the "in custody" requirement of Miranda. I would hold, however, that appellee's trial counsel was ineffective and direct that on remand new counsel be appointed.

It is clear from this record that the issue of the voluntariness of appellee's statements should have been raised at the suppression hearing. Experts for the Commonwealth as well as for the defense testified that appellee was mildly retarded. Appellee was questioned by a state trooper with whom he had been acquainted for several years. Appellee was subjected to repeated questioning and at one point the state trooper yelled at appellee during interview. In addition, the police used appellee's wife to help elicit his confession. From the foregoing I am convinced that the claim that appellee's right to counsel during questioning is another issue not raised below which may have been meritorious. This would be an additional ground for finding of ineffective assistance of

trial counsel. I would therefore remand for the appointment of new counsel to permit consideration of these significant constitutional issues.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DIVISION

COMMONWEALTH OF PENNSYLVANIA, Appellant	:	NO. 25
	:	EASTERN DISTRICT
	:	APPEAL DOCKET, 1984
	:	
	:	APPEAL FROM
	:	JUDGMENT OF
	:	SUPERIOR COURT
	:	OF PENNSYLVANIA
	:	AT NO. 144,
v.	:	PHILADELPHIA, 1981,
	:	DATED
	:	JULY 15, 1983
	:	318 PA. SUPER. CT.
	:	76, 464 A.2d 1236
	:	(1983)
	:	
DAVID E. HUBBLE, Appellee	:	ARGUED:
	:	DECEMBER 7, 1984

DISSENTING OPINION

HUTCHINSON, J. FILED: JANUARY 16, 1986

I dissent fromt he outright reversal of Superior Court's order. That court ordered a grant of post-trial con-

viction relief, based on appellant's Fifth Amendment right to the advice of counsel, under federal case authority resulting from the United States Supreme Court's decision in Edwards v. Arizona, 451 U.S. 477 (1981). Superior Court's reversal of Common Pleas is based on its acceptance of the suppression court's finding that appellee was in custody when he asked for counsel. I would remand this case to Common Pleas for reconsideration, based on the standards set out by the United States Supreme Court in Beckwith v. United States, 425 U.S. 341 (1976), and this Court in Commonwealth vs. McLaughlin, 475 Pa. 97, 379 A.2d 1056 (1977), of its finding that appellee was in fact in custody when he requested counsel. To my mind, the Common Pleas findings on custody are inconsistent and seem to reflect a pre-

presently invalid independent application of the Escobedo v. Illinois, 378 U.S. 478 (1964), focus of suspicion test. Such independent use of that test is inconsistent with the more objective standards of Beckwith and McLaughlin. See also Commonwealth v. Chacko, 500 Pa. 571, 459 A.2d 311 (1983). If Common Pleas reaffirms its factual finding of custody under these currently appropriate standards, I believe Superior Court's holding that the police acted to violate appellee's Fifth Amendment right not to incriminate himself is compelled by the binding authority of the United States Supreme Court in Edwards, supra, and Miranda v. Arizona, 384 U.S. 436 (1966). The interpretation of those cases in the opinion announcing the judgment of the Court contrarily misapplies the United

States Supreme Court's decision in Smith v. Illinois, ____ U.S. ____, 105 S.Ct. 490 (1984) (Per curiam). Therefore, if Common Pleas, on remand, finds appellee gave his statement while in custody, I am reluctantly forced to conclude, as did Superior Court, that Edwards requires a new trial.

The opinion announcing the judgment of the Court states in its discussion of appellee's right to counsel during his interrogation that:

> the record does not establish that appellee "clearly and unequivocally invoked his right to counsel" so as to trigger Edwards' prophylactic prohibition against all further police-initiated conversation.

Slip op. at 8-9 (emphasis in original). I believe that the record contains as clear an invocation of the right to counsel as could be envisioned. The record shows that appellee said "I want

a lawyer." R.R. at 113a. He followed that statement up with "I want a public defender." Id.

I agree that not every vague reference to a lawyer requires the application of Edwards. However, that principle has no application to the facts of this case; appellee's statement is clear and unambiguous. Indeed, I do not see how appellee could have done any more to invoke the Fifth Amendment right, which the United States Supreme Court has seen fit to afford him, to secure counsel's advice before giving an in-custody statement. The opinion announcing the judgment of the Court attempts to justify its determination that this request is not clear enough to invoke Edwards by reference to the fact that appellee first called a private attorney, instead of the public

defender, and finally his probation officer when the private attorney was unavailable. That opinion states he did not call the public defender after being encouraged to do so. That "encouragement" included the statement of the interrogators that they did not think the public defender would be available to him because he had not been arrested. See R.R. at 114a (quoted in opinion announcing the judgment of the Court, slip op. at 11). That self-serving and potentially misleading statement supports a finding that appellee was not in custody, an opinion held by the police themselves and communicated to him. It does not support a finding that he was advised of his right to free counsel before giving a statement to police. It is on this "encouragement," given after appellee's unambiguous

request for counsel, that the opinion announcing the judgment of the Court concludes appellee's request was not clear because he did not follow up on it by calling the public defender.

Such an analysis is inconsistent with the recent United States Supreme Court decision in Smith v. Illinois, ____ U.S. ____, 105 S. Ct. 490 (1984) (per curiam). There the Court stated:

> Where nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease. In these circumstances, an accused's subsequent statements are relevant only to the question whether the accused waived the right he had invoked.
>
> . . . .
>
> We hold only that, under the clear logical force of settled precedent, an accused's post-request responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself. Such subsequent

statements are relevant only to the distinct question of waiver.

105 S. Ct. at 494-95 (emphasis in original).

I agree that this case is controlled by Smith. However, its analysis of that case seems to me to stand Smith on its head. Here appellee clearly indicated that he wanted the assistance of counsel before he gave his statement. Even if the subsequent circumstances set out in the opinion announcing the judgment of the Court show an ambiguity in his request instead of his reliance on the police's statement that the public defender could not help him because he was not in custody, they are post-request irrelevancies on the issue of ambiguity, according to the teaching of the United States Supreme Court in Smith. Using them to cast

doubt upon appellee's initial request for counsel is against both the spirit and letter of Smith.

It seems to me equally incorrect to state that even if appelle's request was sufficient to invoke his right to counsel he waived it by initiating the events that led up to his confession. The evidence on this record is insufficient to establish a waiver of the right to counsel which the United States Supreme Court gave this appellee in Edwards, supra. Edwards stated that once the right to counsel has been invoked it cannot be waived by later uncounseled interrogation unless the defendant initiates the communication. See also Oregon v. Bradshaw, 462 U.S. 1039 (1983); Wyrick v. Fields, 459 U.S. 42 (1982) (per curiam); Rhode Island v.

Innis, 446 U.S. 291 (1980). Edwards stated:

> When an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

451 U.S. at 484-85. This record reveals that subsequent uncounseled interrogation was initiated, not by appellee, but by the police. The opinion announcing the judgment of the Court attempts to construct a subsequent initiation of communication by appellee by the bald statement that:

> appellee initiated the events which lead to his inculpatory statement, since the prior interview had ended and appellee and Mrs. Hubble were in the process of leaving the barracks when appellee requested to stay and talk with his wife privately. These circumstances leading up to and surrounding appellee's requests to call "a lawyer", then Mr. Felix and Mr. McCool do not present the situation on type of police conduct condemned in Edwards v. Arizona.

Slip op. at 13 (emphasis in original). This conclusion is a non-sequitur on this record. Appellee's request to speak with his wife was not an initiation of further communication with the police. A request to speak to one's spouse, albeit in a police station, is not an initiation of a communication with the police which they have an option to convert into a knowing, voluntary and intelligent waiver of appelle's Fifth Amendment right to counsel. It

may be true that if appellee had not asked to speak to his wife before leaving he would not have confessed later on. However, such a "but for" analysis does not lead to the conclusion that he initiated the conversation with the police which led to his confession. On the contrary, the record shows that the police came into the room where the Hubbles were speaking and directly asked appellee if he had committed the crime:

> TROOPER SHIMKO: Sergeant Peterson and I went into the office. Again we could see that [appellee] was visibly upset. Sergeant Peterson talked to [appellee] approximately five minutes and he asked a simple question, . . "Now Dave, were you or weren't you in the house?" And at that time Daye broke down and stated that he was.

R.R. at 128a. Apellee did not ask to speak to the police. He asked to speak to his wife. The police

interrupted them and directly interrogated him in the absence of counsel, after counsel was requested. Appellee's confession followed direct questioning subsequent to his clear invocation of his right to counsel. Under Miranda, if appellee was in fact in custody, under the Beckwith standards, all interrogation must cease after that invocation.

Whether he was in custody is, as stated, a factual issue which I cannot resolve on this record because of the ambiguities in Common Pleas' opinion. In order to clear up those ambiguities, it seems to me Common Pleas must demonstrate its understanding of the current legal standards for determining the fact of custody. In fairness to Common Pleas, however, I note that those standards had not been clearly set forth

in this Commonwealth when Common Pleas considered this case.[1]

To aid Common Pleas in its task, I believe it is necessary to set forth the ambiguities I see in the Common Pleas' custody finding and the development of the law with respect to custody interrogation. To my mind, the suppression court's findings appear so heavily influenced by the well-documented official concentration on appellee as a prime suspect that they imply independent application of the "focus on the investigation" test. This test was

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[1]The delay in processing appelle's appeals after the denial of his post-trial motions is shocking to me. Appellee was convicted on November 25, 1977. He filed post-trial motions on December 12, 1977. The Court held its hearing on thse motions on August 14, 1980, and denied them on October 15, 1980. Appellee filed his notice of appeal on January 14, 1981, and Superior Court issued its order on July 15, 1983.

originally used by the United States Supreme Court in Escobedo, Miranda's harbinger, and we adopted it in Commonwealth v. Feldman, 432 Pa. 428, 248 A.2d 1 (1968). The United States Supreme Court subsequently held in Beckwith that the focus test is not alone sufficient to invoke Miranda. One year later, we suggested that we would follow Beckwith in Commonwealth v. McLaughlin, 475 Pa. 97, 379 A.2d 1056 (1977). However, our subsequent cases were not as clear on the subject. See, e.g., Commonwealth v. Horner, 497 Pa. 565, 442 A.2d 682 (1982); Commonwealth v. Meyer, 448 Pa. 297, 412 A.2d 517 (1980); Commonwealth v. Patterson, 488 Pa. 227, 412 A.2d 481 (1980). We should repudiate the implications in these later cases and expressly follow the Beckwith holding that the focus test,

while still relevant factor in determining custody, is not independently sufficient to trigger Miranda. See Commonwealth v. Holcomb, ____ Pa. ____, 498 A.2d 833 (1985) (opinion announcing the judgment of the Court).

The suppression court in the instant case found that appellee was the subject of custodial interrogation. Superior Court stated that this finding was "amply supported by the record." 318 Pa. Superior Ct. 1t 83, 464 A.2d at 1240. This is true if the appropriate tests were applied by Common Pleas. However, I cannot tell on this record whether they were.

Many of the cases Superior Court cited are themselves based on Escobedo's independent focus test. See, e.g., Commonwealth v. O'Shea, 456 Pa. 288, 318 A.2d 713, cert. denied, 419 U.S. 1092

(1974); Commonwealth v. DiNicuola, 448 Pa. 54, 292 A.2d 333 (1972); Commonwealth v. Simala, 434 pa. 219, 252 A.2d 575 (1969). We should repudiate their implication that Escobedo has continuing independent vitality in this Commonwealth.

Perhaps most important, the suppression court s findings on the issue of custody are internally inconsistent if not based on an independent focus test. We stated in Chacko, supra, that a person is in custody when

> he is physically deprived of his freedom in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or movement is restricted by such interrogation.

Id. at 473, 459 A.2d at 314 (citations omitted).

The inconsistency of the suppression court's findings under the

Chacko standard can be seen by comparing its finidng no. 2 with nos. 13, 14 and 15. In its finding of fact no. 2 the suppression court says:

> 2. [Appellee] was the subject of a custodial interrogation throughout the day of July 12, 1977.

However, findings of fact nos. 13, 14 and 15 state:

> 13. At approximately 3:00 p.m. in the act of leaving the State Police Barracks [Appellee] said that he wanted to speak with his wife alone; they were ushered back to the same room as before and left by themselves.
>
> 14. [Appellee] and his wife were told one hour later they would be taken home if they wished.
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> 15. [Appellee] gave his inculpatory statement to the State Police starting at or about 5:45 p.m., only after two separate conferences with his wife alone totaling a minimum of one and one half hours.

These later findings seem to imply that appellee was not in custody when

interviewed on July 12. See Oregon v. Mathiason, 429 U.S. 492 (1977).

Because the suppression court had before it detailed evidence concerning the police investigation's focus on appellee before the July 12, 1977, interrogation, see R.R. 54a-68a (testimony of Officer Shimko),[2] the Escobedo test, then recently echoed in this jurisdiction by O'Shea, supra, D'Nicuola, supra, and Simala, supra, is a likely basis for its finding that appellee was the subject of custodial interrogation. Under that test, the focus on appellee would have been sufficient by itself to imply custody. The

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[2]Trooper Shimko interviewed appellee about this case on April 7, 1977, July 6, 1977, July 7, 1977, July 8, 1977, and July 12, 1977. Appellee provided information about his brother's involvement in the crime. The police questioned him in the station was well as during a drive around the crime scene.

possibility that Common Pleas may have been relying exclusively on the focus test also appears from the following passage in the en banc opinion (Walter, J.) on post-trial motions. In it, the trial court says:

> In light of the above, we find that, for Miranda purposes, [appellee] was the subject of a custodial interrogation throug-out the day of July 12, 1977. Prior to July 12, 1977, [appellee] had been questioned three times and had undergone a polygraph examination. On July 12, 1977, [appellee] was subjected to another polygraph examination and further questioning. He remained at the station for approximately eight hours.

Trial Ct. slip op. at 3 (en banc).

The lower court nowhere makes a finding that appellee reasonably believed his freedom was restricted by the police, the custody test Mr. Chief Justice, then Mr. Justice, Nix, speaking for our Court, set forth in Commonwealth

v. Chacko, supra. On the contrary, the record shows appellee was told several times that he could go home. R.R. 121a, 125a. Further, appellee's requests for coffee and permission to talk to his wife were always granted. R.R. 97a, 99a 122a, 123a, 127a. Officer Shimko testified "[appellee and his wife] had freedom of the barracks . . . We weren't retaining them in any way." R.R. at 181a. Indeed, the trial court itself noted these facts. See Findings of Fact nos. 13-16, R.R. at 382a-383a. Therefore, the trial court's blanket finding of "custody" is, on the surface, inconsistent with these other findings unless based on the independent focus test in Escobedo, which the United States Supreme Court repudiated as a matter of federal law in Beckwith and which we should put to rest in

Pennsylvania once and for all. Indeed, it is inconsistent with the express feelings of the police themselves, who told defendant they did not think he could get a public defender bcause he was not under arrest.

Although the record thus indicates that the suppression court incorrectly applied an independent focus test to the custody issue, there is also record evidence which would support a finding fo custody under Beckwith and Chacko. Appellee was given a lie detector test and was questioned several times over an eight-hour period. During the suppression hearing, appellee said he was scared to ask about leaving and stated, "I though I'd go to jail if I got up and walked away." R.R. at 322. Appellee's wife, who was also at the station, stated she though they could

not leave because her husband was read his Miranda rights. R.R. at 284. In addition, the fact that appellee was a suspect remains a relevant fact in determining the custody issue. Beckwith, supra. The suppression court therefore had a right to consider the suspicion the police had about appellee in evaluating all the conflicting evidence concerning his freedom to leave. Whether it incorrectly felt the focus on appellee is an independent basis in this Commonwealth for a finding of custody or merely one relevant piece of evidence which it considered in evaluating the whole suppression record for the purpose of resolving the custody issue is not apparent. Since questions involving conflicting evidence, or inferences from it, are for the finder of fact, not an appellate court, see, e.g., Commonwealth

v. Penn, 497 Pa. 232, 439 A.2d 1154, cert. denied, 456 U.S. 980 (1982); Commonwealth v. Whack, 482 Pa. 137, 393 A.2d 417 (1978); Commonwealth v. Richman, 458 Pa. 167, 320 A.2d 351 (1974), I believe we should remand for clarification on this point. Cf. Jasper v. Workmen's Compensation Appeal Board, 498 Pa. 263, 445 A.2d 1212 (1982) (court should remand cases where findings of fact are internally inconsistent). In any event, Superior Court's outright reversal of the suppression court's ruling that the evidence was admissible seems to me incorrect under the standard governing the scope of appellate review of rulings by a suppression court:

> When ruling on suppression motions, the suppression court is required to make findings of fact and conclusions of law as to whether evidence was

obtained in violation of the defendant's constitutional rights. Pa.R.Crim.P. 323(i). The suppression court must determine whether the Commonwealth has established by a preponderance of the evidence that the challenged evidence is admissible. See Pa.R.Crim.P. 323(h). On review, our responsibility is "to determine whether the record supports the factual findings of the court below and the legitimacy of the inferences and legal conclusions drawn from those findings." Commonwealth v. Goodwin, 460 Pa. 516, 521, 333 A.2d 892, 895 (1975).

If the suppression court has determined that the evidence is admissible, "this Court will consider only the evidence of the prosecution's witnesses and so much of the evidence for the defense as, fairly read in the context of the record as a whole, remains uncontradicted." Commonwealth v. Kichline, 468 Pa. 264, 280, 361 A.2d 282, 290 (1976); see Culombe v. Connecticut, 367 U.S. 568, 604, 81 S.Ct. 1860, 1878, 6 L.Ed.2d 1037 (1961) (Opinion of Frankfurter, J.)

Commonwealth v. Brown, 473 Pa. 562, 566, 375 A.2d 1260, 1262 (1977). See also Commonwealth vs. Lark, 505 Pa. 126, 477 A.2d 857 (1984).

Thus, I would remand this case to Common Pleas for consideration of this custody question. However, if compelled to reach the question of appellee's right to counsel, my reading of the United States Supreme Court's opinions in Smith and Edwards, which are binding on us, seems to me to force us to affirm the grant of a new trial, contrary to the reasoning on this issue in the opinion announcing the judgment of the Court.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DIVISION

COMMONWEALTH OF PENNSYLVANIA, Appellant	:	NO. 25 EASTERN DISTRICT APPEAL DOCKET, 1984
	:	APPEAL FROM JUDGMENT OF SUPERIOR COURT OF PENNSYLVANIA AT NO. 144, PHILADELPHIA, 1981, DATED JULY 15, 1983 318 PA. SUPER. CT. 76, 464 A.2d 1236 (1983)
v.	:	
DAVID E. HUBBLE, Appellee	:	ARGUED: DECEMBER 7, 1984

DISSENTING OPINION

JUSTICE ZAPPALA FILED: JANUARY 19, 1986

I join in the dissent of Mr. Justice Hutchinson only insofar as his opinion would hold that Appellee effectively invoked his right to counsel and did not, thereafter, effectively revoke

same. I disassociate myself, however, from the part of the dissenting opinion which addresses the "focus of the investigation" aspect which Mr. Justice Hutchinson perceives to be present in this case but which I cannot find under these facts and which renders this discussion unnecessary. Rather, I find that Appellee was clearly in custody when his request was made, and would, as I did in Commonwealth v. Holcomb, (J-122-1984), (Slip opinion at p. ____ Zappala, J. dissenting), suggest that we save for another day any further discussion of "focus of the investigation's" place in Pennsylvania jurispurdence until such time as the facts place the issue squarely before this Court. In so doing, we shall not add to the

confusion of the law in this area by further cluttering it with unnecessary dicta.

Appendix "B"

COMMONWEALTH OF PENNSYLVANIA, Appellee	)	IN THE SUPERIOR COURT OF PENNSYLVANIA
vs.	)	
DAVID E. HUBBLE, Appellant	)	No. 144 Philadelphia, 1981

Appeal from Judgment of Sentence of the Court of Common Pleas, Criminal Division, of Lebanon County, No. 502 of 1977.

BEFORE: WIEAND, BECK and MONTEMURO, JJ.

OPINION BY WIEAND, J.:

David E. Hubble was tried by jury and convicted of robbery, burglary, theft, criminal conspiracy and three counts of murder in the second degree.[1]

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[1]For a more detailed recitation of the facts surrounding the homicides see this Court's opinions affirming on appeal the conviction of appellant's co-conspirators: Commonwealth v. Hubble, ___ Pa.Super. ___, ___ A.2d ___ (J. 1790/82; filed April 29, 1983); Commonwealth v. Scarborough, ___ Pa.Super. ___, ___ (J. 1789/82; filed April 29, 1983).

On direct appeal from judgments of sentence, Hubble contends that his inculpatory statement was unlawfully obtained and should have been suppressed. We are constrained to agree. Therefore, we reverse and remand for a new trial.[2]

"When ruling on suppression motions, the suppression court is required to make findings of fact and conclusions of law as to whether evidence was obtained in violation of the defendant's constitutional rights.

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[2]In view of our disposition, we need not address appellant's arguments that the trial court erred in 1) denying appellant's request for a continuance; 2) refusing a proposed voir dire question; 3) restricting examination of a witness; 4) denying certain requested points for charge; 5) refusing appellant's motion for new trial based on after-discovered evidence; 6) denying appellant's motion for modification of sentence. We have reviewed the record and find appellant's challenge to the sufficiency of the evidence to sustain the convictions totally devoid of merit.

Pa. R. Crim. P. 323(i). The suppression court must determine whether the Commonwealth has established by a preponderance of the evidence that the challenged evidence is admissible. See Pa. R. Crim. P. 323(h). On review, our responsibility is 'to determine whether the record supports the factual findings of the court below and the legitimacy of the inferences and legal conclusions drawn from those findings.' Commonwealth v. Goodwin 460 Pa. 516, 521, 333 A.2d 892, 895 (1975).

"If the suppression court has determined that the evidence is admissible, 'this Court will consider only the evidence of the presecution's witnesses and so much of the evidence for the defense as, fairly read in the context of the record as a whole, remains contradicted.'

Commonwealth v. Kichline, 468 Pa. 264, 280, 361 A.2d 282, 290 (1976); see Culombe v. Connecticut, 367 U.S. 568, 604, 81 S.Ct. 1860, 1878, 6 L.Ed.2d 1037 (1961) (Opinion of Frankfurter, J.)." Commonwealth v. Brown, 473 Pa. 562, 566, 375 A.2d 1260, 1262 (1977).

When so viewed, the record established that Claire Kepner and her two small children were robbed and murdered in their home near Muncy in Lycoming County on the evening of August 5, 1976. State Police investigated but did not immediately have any suspects and made no arrests. On or about March 30, 1977, Colin Brown, who had seen and talked with appellant on the night of the murder, told Trooper Shimko that appellant had been a participant in the crime. Brown was placed under hypnosis on March 31, 1977 and again implicated

appellant. On April 7, 1977, Shimko arranged to transport appellant, with his consent, to State Police Barracks in Muncy, where he questioned appellant and asked him to submit to a polygraph examination. Appellant consented and signed a written waiver of his Miranda rights. After he had completed the polygraph, appellant was told that he "didn't look very good here." Shimko was also told by the polygraph examiner that appellant was either involved in or had knowledge of the Kepner killings. Although Shimko then proceeded to question appellant further, appellant repeatedly denied involvement in or knowledge of the murders. He was eventually returned to his home and was not questioned again for approximately three months.

On May 16 and 17, 1977, Colin Brown

underwent Sodium Amytal analysis and while under the influence of the drug again stated that appellant had admitted killing the Kepner child. On July 6, 1977, appellant was again transported consensually to State Police barracks for further questioning. He arrived shortly after 3:00 o'clock, p.m., and again executed a written waiver of his Miranda rights. He was then questioned by Sergeant Peterson and Lieutenant McGlynn until approximately 5:00 o'clock, p.m. Shimko and Peterson then took appellant for a drive around Muncy area. They passed the Kepner house twice and parked outside. Appellant was asked whether he had ever been there before or if he recognized the house. He denied ever having been to the house previously and continued in his denial of any involvement in the killings.

He was returned to the barracks and at approximately 8:00 o'clock, p.m. signed a written consent to allow the State Police to take his palm prints. After this he was taken home.

On July 7, 1977, Shimko interviewed appellant's wife, Virginia Hubble, who told Shimko she thought that appellant and she had been fishing with another couple on the evening of August 5, 1976. Near the end of the interview Mrs. Hubble said that her husband had told her of having been threatened by his brother, Robert Hubble, on the evening of August 7, 1976 at the Step Inn and warned not to discuss the Kepner murders with anyone. Shimko told Mrs. Hubble that he would meet her and her husband at the Lycoming County Courthouse the next morning to discuss the August 7, 1976 incident with appellant.

Appellant had been subpoenaed as a prosecution witness in a burglary case against his brother and was scheduled to testify on the morning of July 8, 1977. During questioning in the District Attorney's office that morning, appellant informed Shimko that Robert had admitted involvement in the murders to him and had threatened him with death if he told anyone. Three days later Trooper Shimko again telephoned appellant and arranged to transport him to the State Police barracks for further questioning on the following morning. When Troopers Shimko and Zaremba arrived at appellant's home shortly after 9:30 o'clock, a.m., on July 12, 1977, appellant requested that his wife be permitted to accompany him, and the police agreed. At the barracks, appellant once again signed a waiver of

his Miranda rights and agreed to submit to another polygraph examination. The polygraph examination was completed at approximately 11:00 o'clock, a.m. Trooper Jones, who had conducted the test, informed appellant that the test indicated he had been lying about not participating in the murders. Trooper Jones then left appellant in his office and informed Trooper Shimko that, based on the test results, he believed appellant had been involved in the murders and that Jones "had him in the house." Shimko then informed Virginia Hubble, who was in another office being questioned by Trooper Zaremba, that appellant was probably involved in the killings and requested her assistance in eliciting information from appellant.

Jones and Shimko had known appellant for several years prior to

1977 and were aware that appellant, who had progressed only as far as third grade in a special education class, was dull witted. Indeed, the suppression court found that appellant possessed a "borderline retarded mentality.[3] At or about 11:30 o'clock, a.m., Shimko returned to Jones' office where appellant had been waiting and resumed interrogation, with appellant's wife present. He told appellant that the test had indicated he was lying and that he either had knowledge of or had participated in the crime. Shimko continued his questioning of appellant until shortly before 2:00 o'clock, p.m.,

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[3]Appellant's expert testified that appellant had a verbal IQ of 72 and a performance IQ of 99 for a full scale IQ of 83. The Commonwealth's expert witness testified that his tests indicated a verbal IQ of 79, a performance IQ of 99 and a full scale IQ of 87.

at which point he became visibly angry as a result of appellant's continued denials that he had been involved. He yelled at appellant and told him that he knew he was involved in the crime and was lying, and then stormed out of the room. Shimko returned approximately 15 minutes later and apologized for losing his temper. He then resumed his questioning of appellant, not about his participation in the slayings, but with respect to his brother's statements concerning the murders; and he asked appellant if he would agree to give a statement on tape regarding Robert's statements. Virginia Hubble spoke before appellant responded and suggested to her husband that he obtain a lawyer before giving any further statements. Appellant thereupon requested a lawyer. Appellant testified that the trooper

responded, "I can't give you a lawyer. You're not charged with nothing." Shimko testified that appellant first requested a lawyer and then requested a public defender. The trooper told appellant that a public defender would probably not come out to talk with him because he had not been arrested, but that he could call whomever he wished. Appellant then asked for permission to call Attorney Jack Felix.[4] Shimko looked up Attorney Felix's telephone number for appellant and permitted appellant to dial the number. Felix, however, was not available, and

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[4]Attorney Felix had served as the Lycoming County Public Defender from June of 1970 until March or April of 1976 and had once represented appellant while serving in that office. It is not clear from the record whether appellant was aware that Attorney Felix had resigned from that position.

appellant then requested permission to call his probation officer, David McCool. When appellant reached Mr. McCool, he explained that he was being questioned at the State Police barracks, wanted an attorney and that he had been unable to reach Attorney Felix who was out of town. Appellant asked McCool if the Public Defender's office would represent him while he was being questioned. McCool told appellant that he wasn't sure whether the Public Defender's office would represent him since he had not been arrested but suggested that appellant call the Public Defender's office and ask. Appellant then hung up the phone and spoke for a short period of time with his wife. Shimko again asked appellant if he would give a taped statement, and this time appellant agreed. He gave a taped

statement concerning the statements allegedly made to him by his brother Robert. The taped statement concluded at approximately 2:45 o'clock, p.m. Shimko left appellant in Trooper Jones' office and went into the hallway to speak to Virginia Hubble. He told her he believed that her husband had participated in the murders and that if appellant had anything further to say he should contact Shimko. Shimko and appellant's wife then returned to Jones' office where Shimko repeated to appellant his conversation with Virginia and informed appellant that he would take him home if he so desired. Appellant requested permission to speak to his wife privately, and Shimko left the two of them alone in Trooper Jones' office. During the next forty-five minutes Shimko looked in on them several

times and asked them what they wanted to do. Each time they requested that they be able to continue their conversation privately. At approximately 3:45 o'clock, p.m., Sergeant Peterson and Trooper Shimko entered Trooper Jones' office and began speaking with appellant and his wife. Peterson testified that when he entered Trooper Jones' office he "told Dave that there was an individual that we had talked with who told us that at the time of the crime David was in the car, David went into the house with Bob and Milt . . . . And exactly basically what this individual had told us as far as David's participation in the crime." Appellant's wife then interrupted and gave an account of the events of the evening of August 5, 1977, which incriminated appellant, his brother Robert and Milton Scarborough.

Shimko said that her statement was an accurate account of the crime. Mrs. Hubble explained that she had pieced the story together after "sitting there listening to conversations that Trooper Zaremba and Trooper Shimko had been having with her and Dave that day . . . ." Appellant again denied that he had participated in any way in the murders and again asked to speak with his wife privately. Approximately one-half hour later, Peterson and Shimko re-entered the room, without being requested to do so by either appellant or his wife. Sergeant Peterson again began questioning appellant, and approximately five minutes later asked appellant, "Now, Dave, were you or weren't you in the house?" Appellant then "broke down and stated that he was." Following his oral confession,

appellant gave a taped confession from 5:45 o'clock, p.m. until 6:30 o'clock, p.m. The District Attorney was contacted and, upon Shimko's request, agreed to defer appellant's arrest until after Robert Hubble's preliminary hearing. Shimko then took appellant and his wife to her parents' home where he explained to her parents the events of the day and requested that they permit appellant to stay with his wife at her home until he was formally arrested. Appellant was arrested a month later on August 3, 1977.

The suppression court held that appellant had been subjected to custodial interrogation on July 12, 1977 for Miranda purposes and that the investigating officers had engaged in interrogation and conduct calculated to or likely to evoke admissions. We agree

with these legal conclusions. They are based upon the court's findings of fact and are amply supported by the record. See: Commonwealth v. Chacko, ___Pa.___, ___, ___ A.2d ___, ___ (J. 85; filed April 27, 1983) (Slip opinion pgs. 4-7); Commonwealth v. Brown, supra at 570, 375 A.2d at 1264; Commonwealth v. O'Shea, 456 Pa. 288, 318 A.2d 713, cert. denied, 419 U.S. 1092, 95 S.Ct. 686, 42 L.Ed.2d 685 (1974); Commonwealth v. Yount, 455 Pa. 303, 309, 314 A.2d 242, 245-246 (1974); Commonwealth v. Romberger, 454 Pa. 279, 283, 312 A.2d 353, 355 (1973); vacated, 417 U.S. 964, 94 S.Ct. 3166, 41 L.Ed.2d 1136 (1974), reinstated on remand, 464 Pa. 488, 347 A.2d 460 (1975); Commonwealth v. D'Nicuola, 448 Pa. 54, 57, 292 A.2d 333, 335 (1972); Commonwealth v. Simala, 434 Pa. 219, 223-225, 252 A.2d 575, 577-578 (1969);

Commonwealth v. Banks, 429 Pa. 53, 58-59, 239 A.2d 416, 419 (1968). The suppression court determined further that appellant had been adequately advised of his right to appointive counsel and that he had voluntarily and knowingly waived his right to such counsel. We are bound by the court's findings of fact where, as here, they are supported by the record. However, "we are of course not bound by the lower court's conclusions of law. . . . See e.g., Commonwealth v. Davis, 491 Pa. 363, 421 A.2d 179 (1980); Commonwealth v. Webb, 491 Pa. 329, 421 A.2d 161 (1980); Commonwealth v. Cruz, 489 Pa. 559, 414 A.2d 1032 (1980); Commonwealth v. Williams, 287 Pa. Super. Ct. 19, 429 A.2d 698 (1981)." Commonwealth v. Lapia, ___ Pa. Super. ___, ___, 457 A.2d 877, 885-886 (1983).

"The general rule is that once an individual is given the Miranda warnings and wishes to exercise any of those rights, all interrogation must cease. Commonwealth v. Nahodil, 461 Pa. 301, 341 A.2d 91 (1975); Commonwealth v. Youngblood, 453 Pa. 225, 307 A.2d 922 (1974); Commonwealth v. Mercier, 451 Pa. 211, 302 A.2d 337 (1973); Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)." Commonwealth v. Scarborough, 491 Pa. 300, 313, 421 A.2d 147, 153 (1980). See also: Fare v. Michael C., 442 U.S. 707, 719, 99 S.Ct. 2560, 2568, 61 L.Ed.2d 197 (1979); United States v. Hinckley, 217 App.D.C. 262, 672 F.2d 115, 122 (1982); Commonwealth v. Nathan, 445 Pa. 470, 475, 285 A.2d 175, 177 (1971); Commonwealth v. Frison, 301 Pa. Super. 498, 508, 448 A.2d 18, 23 (1982).

Shimko's testimony explained the circumstances surrounding appellant's request for counsel as follows:

"A. Ginny, Virginia turned to Dave and says, 'Dave, I think you better get a lawyer.'

Q. What did he say?

A. He said, 'I want a lawyer.'

Q. A lawyer?

A. 'I want a lawyer.'

Q. Any in particular? Did he mention the public defender?

A. He mentioned the public defender a short period of time later, yes.

Q. What did he say about a public defender?

A. He said, 'I want a public defender.'

Q. What did you say to him when he said he wanted a lawyer or a public defender?

A. At this particular time I said to Dave -

Q. Excuse me, I'm sorry, When he said 'I want a lawyer,'

did you make any response to that?

A. It's after he stated 'I want a public defender' is when I made the response to him.

Q. What was your response?

A. My response to Dave at this particular time was, 'Dave, you can call whoever you want to call. I do not believe that a public defender will come out to talk to you because you were not arrested. We are not accusing you of any crime. We're talking about what Bob had told you. This is all we're concerned with at this particular time, but you are willing or you're able to call whoever you wish to call.'

. . . .

Q. What was Mr. Hubble's response to what you said?

A. Mr. Hubble said, 'I want to call Mr. Felix.'

. . . .

Q. Did you give a phone book to Mr. Hubble so that he could look up the number?

A. I believe I looked the phone number up for Mr. Hubble.

Q. Of Mr. Felix?

A. Of Mr. Felix.

Q. Did Mr. Hubble dial the phone for Mr. Felix?

A. Yes, he did.

Q. Did he reach somebody at the other end?

A. He talked to his secretary.

Q. Were you listening in?

A. I was listening from my side.

Q. You heard Mr. Hubble's side of the conversation?

A. Yes.

Q. Go ahead. What did you hear?

THE COURT: You weren't listening in on the phone?

THE WITNESS: No, no. I was listening to the conversation that Mr. Hubble was having. Mr. Felix was not in at that particular time.

BY MR. BANKS: (Continuing)

Q. Was that the impression you got?

A. That is the impression I received.

Q. Did Mr. Hubble say anything at that point?

A. He just hung the phone up.

Q. Did he make any more calls?

A. Yes.

Q. Why?

A. Mr. Hubble then said he wanted to talk to his probation officer, Dave McCool. He then reached into his wallet and pulled out Mr. McCool's telephone number from the inside of his wallet and called that particular telephone number. This was the home phone of Mr. McCool.

Q. What time was this?

A. Shortly before the tape was given. I would say approximately 10, 15 minutes beforehand.

Q. Did he reach Mr. McCool?

A. He reached Mr. McCool at home.

Q. Did you get the impression he was talking with Dave McCool?

A. Yes.

Q. How long did he talk to Mr. McCool?

A. A matter of two, three minutes.

Q. When he hung up did Mr. Hubble say anything to you or to Trooper Zaremba?

A. Mr. Hubble then conferred with Ginny for a period of between three to five minutes, that range. I again asked Mr. Hubble at that time whether or not he wished to give me a taped statement. At that time he stated he would."

The United States Supreme Court held in Edwards v. Arizona, 451 U.S. 477, 484-485, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), reh. denied, 452 U.S. 973, 101 S.Ct. 3128, 69 L.Ed.2d 984 (1981), "that when an accused has invoked his

right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." It held further "that an accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication exchanges or conversations with the police." (footnote omitted) (emphasis supplied). See also: Wyrick v. Fields, ___ U.S. ___, ___, 103 S.Ct. 394, ___, 74 L.Ed.2d 214, 217 (1982). The defendant in Edwards had been arrested at his home on charges of murder, robbery and burglary

and had been taken to the police station where he was informed of his rights as required by Miranda. He agreed to submit to questioning and was told that another individual already in custody had implicated him in the crime. Edwards denied any involvement and gave a taped statement consisting of an alibi. He then indicated that he wished to "make a deal" but stated that he wanted an attorney before making the deal. All questioning immediately ceased. The next morning two officers came to the jail to speak with Edwards. Edwards told the guard he didn't wish to see anyone, but was told by the guard that he had to meet with the officers. The officers identified themselves and informed Edwards of his Miranda rights. Edwards indicated that he was willing to talk with the officers but asked first

to hear the taped statement of the individual who had implicated him. After listening to the tape, Edwards said he would tell the officers anything they wanted to know as long as it was not taped. He then confessed. The Arizona Supreme Court held that Edwards' waiver and confession had been voluntarily and knowingly made. The United States Supreme Court, reversing the Arizona Supreme Court, observed that "the voluntariness of a consent or an admission on the one hand, and a knowing and intelligent waiver on the other, are discrete inquiries. Here, however sound the conclusion of the state courts as to the voluntariness of Edwards' admission may be, neither the trial court nor the Arizona Supreme Court undertook to focus on whether Edwards understood his right to counsel and intelligently and

knowingly relinquished it. It is thus apparent that the decision below misunderstood the requirement for finding a valid waiver of the right to counsel, once invoked." Edwards v. Arizona, supra at 484, 101 S.Ct. 1880, 68 L.Ed.2d 378.

In the instant case, appellant, who had a borderline retarded mentality, requested counsel to assist him during questioning. He was told that the public defender would not respond to a request for assistance because appellant had not been arrested and was not being accused of a crime. This, despite the fact that on several prior occasions he had been told that he was entitled to counsel before answering any questions and that if he was unable to afford counsel, one would be appointed to represent him free of charge. It was

also said despite the fact that police believed appellant to have been a part of the killing. It was, at best, misleading to tell him that he was not a suspect. In fact, Colin Brown had already identified appellant as a participant in the murder of Mrs. Kepner's children and had told police that he heard appellant admit involvement. The police, moreover, had repeatedly told appellant that his denials of involvement were lies and that they had a witness who could testify regarding his participation.

The United States Supreme Court has expressly held that "a valid waiver of [the right to counsel] cannot be established by showing only that [the defendant] responded to further police-initiated custodial interrogation even if he has been advised of his right."

Edwards v. Arizona, supra at 484, 101 S.Ct. 1880, 68 L.Ed.2d 378 (emphasis supplied). See also: United States v. Hinckley, supra at 122; Commonwealth v. Youngblood, supra at 232-234, 307 A.2d at 926-927; Commonwealth v. Mercier, supra at 215-216, 302 A.2d at 340; Commonwealth v. Nathan, supra at 475-476, 285 A.2d at 177-178; Commonwealth v. Frambro, 230 Pa. Super. 220, 224, 326 A.2d 436, 437 (1974); State v. Fuentes, 443 A.2d 184, 191 (R. I. 1981); Vaughn v. State, 248 Ga. 127, ___, 281 S.E.2d 594, 597 (1981). The record in this case establishes beyond peradventure of a doubt that after appellant had clearly and unequivocally invoked his right to counsel and after he had attempted, unsuccessfully, to reach counsel by telephone, he was questioned further by Trooper Shimko.

That he responded to such police-initiated questioning does not establish a waiver of the right to counsel previously invoked. "For a waiver. . . to be effective, the reversal of the defendant's positon must have been initiated by him." Commonwealth v. Frambro, supra at 223, 326 A.2d at 437, quoting Commonwealth v. Mercier, supra at 216, 302 A.2d at 340 (emphasis supplied). Here, it was not appellant who, after asserting his rights, indicated a desire to waive them without further activity on the part of the police. Instead, it was the police who initiated the chain of events which culminated in appellant's inculpatory statement. This was improper. Appellant had requested and was entitled to have counsel present. His statement given in response to police questioning and without coun-

sel should have been suppressed.

The judgment of sentence is vacated, and the case is remanded for a new trial. Jurisdiction is not retained.

Appendix "C"

IN THE COURT OF COMMON PLEAS OF
LEBANON COUNTY, PENNSYLVANIA

CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	ACTION NO. 502
vs.	:	1977
DAVID HUBBLE	:	

APPEARANCES:

ROBERT F. BANKS, ESQUIRE First Assistant District Attorney	FOR THE COMMONWEALTH
ROBERT B. ELION, ESQUIRE	FOR THE DEFENDANT

OPINION, WALTER, J., FOR THE COURT
EN BANC, OCTOBER 15, A.D., 1980.

After twelve days of trial a jury on November 25, 1977 found defendant guilty of robbery, burglary, theft, conspiracy and six counts of murder in the second degree. David E. Hubble, the defendant, timely filed post-trial motions for a new trial and, in the al-

ternative, in arrest of judgment. We have been favored with briefs from both sides; oral argument was waived. The issues raised by defendant in his motions and subsequent listing of additional reasons will be treated seratim.

I.

Defendant first contends that the Court erred in failing to grant his motion to suppress incriminating statements taken from him by the police. Specifically, defendant alleges that on July 12, 1977, he was subject to custodial interrogation calculated to evoke admissions without being adequately informed of his right to counsel and in the absence of an intelligent, informed waiver of such right.

a.

We must first determine whether or not defendant was subject to custodial interrogation on July 12, 1977. The test for determining whether a person is in custody for Miranda[1] purposes is whether he ". . . is physically deprived of his freedom in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or movement is restricted by such interrogation. . . ." Commonwealth v. Romberger, 454 Pa. 279, 283, 312 A.2d 353, 355 (1973).

Defendant relies on Commonwealth v. Brown, 473 Pa. 562, 375 A.2d 1260 (1977), in support of his contention that a reasonable man in defendant's

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1See Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966).

situation would have perceived the restraint of his freedom. In Brown, supra, police took defendant to a public building and questioned him intermittantly over a period of ten hours. The next day police informed defendant of discrepancies between his statements and those of another security guard on duty the night of the killing. Both he and the other guard were taken back to the public building, but defendant was not told he was not under arrest nor that he was free to leave.

The Court held questioning on the second day constituted custodial interrogation for which prior warning were required. Moreover, where oral admission and a subsequent taped statement were obtained through exploitation of a statement obtained from defendant during earlier, prewarning interroga-

tion, such admission and statement should have been suppressed.

In light of the above, we find that, for Miranda purposes, defendant was the subject of a custodial interrogation throughout the day of July 12, 1977. Prior to July 12, 1977 defendant had been questioned three times and had undergone a polygraph examination. On July 12, 1977 defendant was subjected to another polygraph examination and further questioning. He remained at the station for approximately eight hours.

b.

Given that finding we must determine whether defendant was subject to police conduct calculated to or likely to evoke admissions.

In Commonwealth v. Yount, 455 Pa. 303, 309, 314 A.2d 242, 245-6 (1974),

the Court, quoting Commonwealth v. Simala, 434 Pa. 291, 226, 252 A.2d 575, 578 (1969) stated:

> "'[I]t is not simply custody plus "questioning," as such, which calls for the Miranda safeguards but custody plus police conduct. . .calculated to, expected to, or likely to, evoke admissions.'

"The rational behind this holding is found in Miranda where the Court stated:

> "Confessions remain a proper element in law enforcement. . . The fundamental import of the privilege. . . is not whether [an individual] is allowed to talk to police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that the police stop a person who enters a police station and states that he wishes to confess to a crime . . . . Volunteered statements of any kind are not barred by the Fifth Amendment. . . .

"Miranda v. Arizona, supra, at 478, 86 S. Ct. at 1630 (emphasis added).

> "'Clearly, "any question likely to or expected to elicit a confession constitutes 'interroga-

> tion' under Miranda. . .
> "Commonwealth v. Simala, supra at 227, 252 A.2d at 579. Accord, Commonwealth v. Mercier, 451 Pa. 211, 214, 302 A.2d 337, 339 (1973). But "[a]ny statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." Miranda v. Arizona, supra at 478, 86 S. Ct. at 1630, 16 L. Ed.2d 694.'"

It is clear, in the instant case, that defendant was subject to interrogation on July 12, 1977. First, Trooper W. Jones testified at the suppression hearing that after administering the polygraph test on July 12, he told defendant: "David, I still don't think you're telling us the whole truth about this." (Supp. T. 33) Furthermore, he informed Trooper Shimko that defendant was "reacting" to the questions asked that day and that the test results indicated that defendant had been in the house. (Supp. T. 50-51)

Defendant was then told by Trooper Shimko that he was being deceitful in his interview with Trooper Jones and that "he had some knowledge about this particular offense and that he could have participated or had knowledge of this offense in some way, shape or form." (Supp. T. 100) At one point Trooper Shimko became angry and left the room. Before leaving he told defendant that ". . . I felt that he was involved in his offense, that he could have been in the house and that he could have participated in some way, shape or form, and that I felt that he was not being truthful with me and I walked out of the room." (Supp. T. 102) The record goes on to recount various instances when defendant was interrogated regarding his involvement in the murders.

As defendant was subject to inter-

rogation, the procedural safeguards of Miranda apply.

c.

Having found that defendant was entitled to Miranda warnings, we must next decide whether he was adequately advised of his rights.

Defendant contends that he was not adequately advised of his right to counsel since he was led to believe that appointive counsel was unavailable. We find no merit in defendant's argument.

Trooper Shimko testified at the Suppression Hearing that defendant was told he could call whoever he wished. ". . . I do not believe that a public defender will come out to talk to you because you were not arrested. . ., but you are willing or you're able to call whoever you wish to call."

(Supp. T. 114) Defendant then attempted to contact Mr. Felix, a lawyer located in Williamsport, Pennsylvania, who had previously been a public defender in Lycoming County. Mr. Felix was unavailable.

Defendant then contacted his probation officer, David McCool. Mr. McCool testified that he told defendant he wasn't sure whether the public defender's office would represent him at that time. However, he told defendant ". . . to call them and find out. I had no knowlege whether they would or not." (Supp. T. 251) After the conversation with Mr. McCool, defendant conversed with his wife for three to five minutes. Trooper Shimko then asked whether defendant wished to give a statement. Defendant stated he would. (Supp. T. 117) He was advised of his Miranda

rights and again asked whether he wished to give a statement. He replied "Yes." (See Exhibit 19)

Based upon these facts we find that defendant was adequately advised of his right to counsel.

d.

Once we find that defendant was fully advised of his right to counsel, we must next ascertain whether he waived his right.

It is axiomatic that a defendant may waive his right to counsel and privilege against self-incrimination. A heavy burden, however, rests upon the prosecution to show such a waiver. We are persuaded the burden was met in this case.

In Commonwealth v. Bullock, 459 Pa. 243, 328 A.2d 494 (1974), the defendant

(1973);.

In the instant case, defendant was given the opportunity to contact the public defender's office. He failed to do so. He thereafter talked with his wife, who had acted as his advisor on many occasions before and was undisputedly operating in that capacity this day, and then agreed to give a statement. He was informed of his Miranda rights for the third time[2] that day and for the third time he waived those rights. It is clear that any subsequent statements were made after a knowing and intelligent waiver of his constitutional rights. There is no evidence that the defendant was tricked into giving a statement or that his will was overborn.

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[2]First, by Trooper Jones; second, at the beginning of the interview with Cpl. Shimko, by the latter.

The police were not dealing alone with a defendant possessed of borderline retarded mentality. Defendant may have a compelling argument if it were so. But here defendant was told twice - by Officers Shimko and by his Probation Officer - to call the Public Defender office to determine if he could get a lawyer under the circumstances obtaining. Furthermore, he had ample opportunity to talk with his wife on whom he placed great reliance, throughout the day generally and at the critical moment in particular. It was only after talking with her that defendant decided he wanted to make a statement without benefit of counsel.

II.

Specifically, defendant states that the "totality of the circumstances"

under which the confession was given requires the conclusion that the confession was coerced. We disagree.

Throughout the day starting at approximately 10:00 a.m. defendant had ample opportunity to use the toilet facilities, refused several offers of food but drank an abundance of coffee; the physical conditions of his detention were pleasant, airy and bright; and his wife was with him constantly during the period of interrogation. He had a considerable opportunity to discuss his situation fully with his wife before he confessed.

Moreover, about 3:00 p.m. or about one and a half hours before defendant made his inculpatory statement, the police adorned with coats and hats, were ready to take the Hubbles home. Staying longer - the next three and half hours -

was the defendant's decision. And again, during a private conference with Virginia that consumed the first forty-five minutes of that span, defendant was informed the police were ready to take them home.

We are satisfied - and so was the jury, apparently - David Hubble's confession was the product of a "free and unconstrained choice."

III.

Defendant's next argument entails the applicability of the Futch Rule.[3] Defendant asserts he was arrested on July 12, 1977 but not arraigned until August 3, 1977. Our review of the case law supports the finding that defendant was not arrested on July 12, 1977.

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[3] Commonwealth v. Futch, 447 Pa. 389, 220 A.2d 417 (1972).

In determining whether or not an arrest for Fourth Amendment purposes has been made, the intent of the parties is of great importance. "'An arrest may be accomplished by "any act that indicates an intention to take [a person] into custody and subjects him to the actual control and will of the person making the arrest."'" Commonwealth v. Farley, 468 Pa. 487, 494, 364 A.2d 302 (1976).

In this case there was no intent on the part of the police to arrest defendant and no belief on the part of the defendant that total submission to police control was required. The record is replete with indicators defendant voluntarily came to the station for questioning and voluntarily remained after the initial questioning had been completed. He was not taken into custody nor deprived of his freedom to

leave even after his confession was recorded. Nor did his wife, with him in the building the entire time, feel they could not go anytime they chose. The Futch Rule is, therefore, inapplicable.

IV.

The defendant next claims the Court erred in not granting defendant's request for continuance. Defendant's counsel contends three months was an insufficient period of time to prepare the case for trial.[4] We find little merit in this argument. Neither the surrounding facts nor the nature of the case was so intricate as to warrant a finding that defendant was denied his

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[4]The facts disclose that Robert B. Elion, Esquire, was appointed as Special Public Defender on August 19, 1977. The trial commenced on November 14, 1977.

due process rights. Indeed, defendant's counsel did an admirable job in presenting defendant's case. As his own Petition for Continuance indicated, he expended a considerable period of time working on the case.

In Commonwealth v. Plath. ___ Pa. Super. ___, 405 A2d 1273 (1979) the Court held no abuse of discretion in denying defendant's request for a continuance where the request was based on the absence of a witness and defendant gave no assurance concerning the content of his testimony or even, whether the witness could be located.

Defendant's request of a continuance in this case in order to track down all "leads" and investigate all potential witnesses was properly denied.

V.

Defendant argues here that the Court erred in not permitting a proposed voir dire question, to wit: "David Hubble has given the statement to the police which puts him at the scene of the crime while the murders took place. Will this fact alone prevent you from listening to the evidence and rendering a fair verdict based solely upon that evidence?"

Preliminarily, we note that the goal of questioning prospective jurors is to provide the accused with a competent, fair, impartial and unprejudiced jury. Commonwealth v. Fulton, ___ Pa. Super. ___, 413 A.2d 742 (1980). "While considerable latitude should be permitted in a voir dire, the inquiry should be strictly confined to disclosing qualifications of a jury and

whether a juror has formed a fixed opinion or may be otherwise subject to disqualification for cause." Id. at ___, 413 A.2d at 743.

Defendant's proposed jury question went beyond merely inquiring into juror prejudice. Instead, defendant attempted to ask a question "'. . . designed to disclose what a juror's present impression or opinion may be or what his attitude or decision will likely be under certain facts which may be developed in the trial of the case.'" Commonwealth v. Werts, 483 Pa. 222, 224, 395 A.2d 1316, 1317 (1979) quoting from Commonwealth v. Johnson, 452 Pa. 130, 134, 305 A.2d 5, 7 (1973).

We find no reason to disturb the refusal by the Trial Court to permit that question on voir dire.

VI.

Similarly we find no merit in defendant's contention the Court erred in not permitting an examination of Colin Brown regarding an incident which took place at Dennis Carpenter's house in early July, 1976. Defendant argues such was relevant as bearing upon Brown's possible confusion of the nights of August 5, 1976 and that one in July, 1976.

Whatever prejudice may have resulted to defendant and we see none, is erasd by the wide latitude given defendant on the cross-examination of Brown. Defendant has myriad opportunities to demonstrate Brown's recall or lack thereof.

VII.

We turn now to defendant's asser-

tion there was insufficient evidence to sustain his conviction of the crimes charged.

In Commonwealth v. Harper, 485 Pa. 572, 576 403 A.2d 536, 538 (1979), the Supreme Court stated:

> "In evaluating the sufficiency of the evidence, the test is whether, viewing the evidence in the light most favorable to the Commonwealth, and drawing all reasonable inferences favorable to the Commonwealth, there is sufficient evidence to find every element of the crime beyond a reasonable doubt. . . The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable double by means of wholly circumstantial evidence."

There is nothing to be gained by outlining here the details of the heinous crimes perpetrated on the victims by the defendant and his co-conspirators. That is done for us in the record; through the testimony of an

accomplice; in the pellucid account of their investigations rendered by the police officers, who demonstrated exceptional skill in their work; and not the least, in the recorded confession given by the defendant to the police, unencumbered by duress, coercion and overborn will, relating his part in the crimes and describing in detail what happened.

The jury was given proper instruction on the place in evidence that confession occupied, how to evaluate whether it was voluntary, and that evidence extraneous to its content must corroborate it. We are persuaded the jury believed Colin Brown's account of defendant's conduct, demeanor and statements on defendant's return for "a quest for beer", as well as John Shafer's discourse regarding his presence with Scarborough and the Hubble brothers on

the ill-fated foray. The testimony with other similar evidence of like kind coupled to the gruesome physical facts reviewed by law enforcement representative was sufficient, if believed by the jury, to validate the subject matter of the confession

No legal citation is necessary to posit the maxim the jury is at liberty to believe whom it will. It is painfully obvious the jury declined to accept as credible the evidence proffered by defendant tending to show he was elsewhere on the night in question. Those twelve men and women heard it all, sifted through the considerable supply of exhibits, documents, data, confirmations and authentications.

From it they decided the defendant did accompany his brother Robert and Milton Scarborough into the Kepner

house, that one of the three demanded money from Mrs. Kepner who refused, that she was shot and killed for her trouble by the culprit attempting the exaction; that the defendant then participated in slaying the two youngsters and in taking the approximate eighty dollars from Mrs. Kepner's purse.

It was bestiality, an exhibition of sheer baseless morality, a seeming barbaric ritual, bespeaking of the practitioners nothing of socially redeeming virute.

There was ample evidence not only to establish the homicides, but the crimes of burglary - entry of Mrs. Kepner's home without permission and with the intent on the part of the defendant to commit a crime: theft, of robbery - taking property of another by force and, in this case, inflicting

serious (mortal) bodily injury; of theft itself - unlawful taking of property belonging to another with no intent of returning it; and of conspiracy - the mere fact the defendant was acting with two others in the types of crimes committed would belie coincidental presence of the three.

In our perspective the jury made no error in evaluating the testimony. There is more than sufficient credible evidence to sustain the verdicts.

VIII.

Finally, defendant complains that this Court erred in denying points for charges Nos. 7, 9 and 11.

Defendant's request for jury instruction No. 7 read as follows: "The additional element of flight, which is as consistent with fear as it is with

guilt, does not convert one's presence at the scene of the crimes to guilt."

This charge was refused because of the lack of evidence of "flight" as the word is commonly used.[5] Defendant's reliance on Commonwealth v. Goodman, ___ Pa. Super. ___, 350 A.2d 810 (1976) for support of his proposition is misplaced.

In that case the Court held that the evidence was as consistent with the inference that defendant innocently, happened upon the scene and fled out of fear as it was with the inference that defendant was a participant in the burglary. Therefore, presence of defendant at scene of crime was not sufficient to establish guilt beyond

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[5]The Random House Dictionary defines flight as the "act of fleeing; hasty departure."

reasonable doubt. In this case we would be hard-pressed to find that the two above inferences were equally weighted.

But beyond that there was no flight on which we are aware other than leaving the scene of the crime after everything the defendant set out to do was accomplished. Were we to accept defendant's interpretation of that activity we would be lead to the absurd result of requiring courts to use that charge in every case not involving red-handed apprehension of the defendant. As we stated before the record contains sufficient credible evidence to find that defendant participated in the crimes. Accordingly we hold that point No. 7 was properly refused.

The defendant also challenges the court's refusal of point No. 9. Its requested charge states: "If the defen-

dant in this case, had knowledge of the perpetration of these crimes, after their commission he is not rendered responsible for the commission of those crimes either as a principal or an accessory (sic)". We would respectfully call to defendant's attention that point was read to the jury. See page 2324 of the trial transcript.

Finally, defendant claims the Court erred in refusing point No. 11, which read: "Even if you find that the defendant, David Hubble, was present at the home of Claire Kepner, in her kitchen, and if you find in addition that he went to the house believing that Milton Scarborough or Bob Hubble were intending to borrow money from the occupant of the home, that he himself did not commit any of the crimes alleged, that he was merely present in the kitchen without

any criminal intent, you must find him not guilty of all of the charges against him."

That theory was adequately covered in other instructions to the jury by the Trial Court. A review of the Trial Transcript, pages 2324 2265 and 2340 will demonstrate that. Once a point or tenet is covered it need not be re-emphasized ad nauseum. On balance, defendant was given the benefit of a fair charge.

Defendant's further arguments that this Court should grant him a new trial based upon after-discovered evidence and upon failure of the Commonwealth to provide defense counsel with certain post-

trial exculpatory evidence[6] were addressed in an Adjudication dated June 11, 1980, incorporated herien by reference, of which defendant was given notice.

Try as we might we can find no meritorious reason to arrest judgment or on which to base an award to the defendant of a new trial. Accordingly his post-trial motions will be refused.

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[6]Later withdrawn as an issue by defendant at the February 13, 1980 hearing on the alleged after-discovered evidence.

Appendix "D"

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellant	:	NO. 25 E.D.
	:	APPEAL DOCKET,
vs.	:	
	:	1984
DAVID E. HUBBLE, Appellee	:	

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the ORDER of the SUPERIOR COURT which vacated the judgment of sentence and remanded for a new trial, is REVERSED and we REMAND this case to the Superior Court for disposition of appellee's remaning allegations of error.

BY THE COURT:

_____
Marlene F. Lachman, Esq.
Prothonotary

DATED: January 16, 1986